Supreme Court, U.S.
FILED

02179 6 MAY 23 2003

No. _____

In The

Supreme Court of the United States

MARLIN DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

W. Scott Newbern
215 South Monroe Street
Suite 303
Tallahassee, Florida 32302
850.591.1707

William VanDercreek
Counsel of Record
9441 LBJ Freeway Suite 350
Dallas, TX 75243
214.361.4005

Attorneys for Petitioner

54 pp

QUESTIONS PRESENTED

PREFACE Petitioner sought a Certificate of Appealability ("COA") from denial of relief under 28 U.S.C. § 2255. On January 8, 2003 the United States Court of Appeals for the Eleventh Circuit denied a Certificate. Davis filed a motion for reconsideration, which was denied on February 24, 2003.

On February 25th, this Court decided *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003) which expressly clarified the criteria for COA's. The issues identified in the request for the COA were directly supported by rulings of this Court and several federal appellate courts. Davis promptly filed his Motion for Leave to file a Request for Further Review. The Motion and the Request were returned by the Clerk on the basis that a second Motion for reconsideration was not authorized.

Petitioner Presents Alternative Questions:

Whether this Court should grant certiorari and remand for reconsideration in light of this Court's subsequent decision in Miller-El v. Cockrell.

OR

Whether a COA should have been granted to consider the following issues:

1. *Whether the sentence for conviction under a single-count indictment charging a conspiracy "to distribute controlled substances, that is cocaine, cocaine base (commonly known as crack cocaine) and marijuana" should be based on the controlled substance with the least penalty instead of the substance with the greatest penalty*

2. *Whether ineffective assistance of counsel, by failure to object to the government's pervasive use of Petitioner's*

ethnicity to prove membership in a drug conspiracy, and to prejudice the jury by blaming "Jamaicans" (blacks of Jamaican national origin form the Miami area) of using and exploiting "Americans" (local North Florida blacks as were five of the jurors), violated Petitioner's constitutional rights.

3. *Whether ineffective assistance of counsel, by failure (a) to seek a change of venue, (b) to use the opportunity afforded by the* district court *to conduct a meaningful voir dire of jurors for exposure to newspaper and television reports with extensive reference to Jamaicans and falsely accusing petitioner's brother and sole co-defendant at trial of being a "Drug King" responsible for the well publicized death of a state trooper, and (c) failure to prevent consequence of pretrial publicity from infecting the jury trial proceedings, denied Petitioner's constitutional right to fair trial.*

PARTIES

Marlin Davis

Emerson Davis: Marlin Davis' brother and sole co-defendant at trial has a COA pending in the Eleventh Circuit from the same opinion of the district court denying relief to Marlin Davis.

(both are presently incarcerated)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF CITATIONS v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS WHY CERTIORARI SHOULD BE GRANTED 5

I. MARLIN DAVIS' COA SHOULD BE GRANTED UNDER *MILLER-EL V. COCKRELL* 5

II. MARLIN DAVIS SHOULD HAVE BEEN SENTENCED FOR THE CONTROLLED SUBSTANCE WITH LEAST PENALTY AND NOT THE HIGHEST 6

III. ETHNICITY – PRETRIAL PUBLICITY – *VOIR DIRE* 16

TABLE OF CITATIONS

CASES

Batson v. Kentucky,
476 U.S. 79 (1986).....18, 19

Bell v. Cone,
535 U.S. 685 (2002).....9

Chandler v. United States,
218 F.3d 1305 (11th Cir. 2000).....19

Cummings v. Dugger,
862 F.2d 1504 (11th Cir. 1989).....26

Edwards v. United States,
523 U.S. 511 (1998).....7, 10, 11

Glover v. United States,
531 U.S. 198 (2001).....9

Massaro v. U.S.,
123 S.Ct. 1690 (2003).....19

McClesky v. Kemp,
481 U.S. 279 (1987).....18

Miller-El v. Cockrell,
123 S.Ct. 1029 (2003).....i, 4, 5, 6, 9, 26

Rose v. Mitchell,
443 U.S. 545 (1979).....18

Strickland v. Washington,
466 U.S. 668 (1984).....9

United States v. Allen,
302 F.3d 1260 (11th Cir. 2002).....3, 12, 13, 14

United States v. Arango ,
853 F.2d 818, 823 (11th Cir. 1988) 19

United States v. Barnes,
158 F.3d 662, 672 (2d Cir. 1998) 14

United States v. Beckner,
69 F.3d 1290 (5th Cir. 1995) 26

United States v. Davis,
583 F.2d 190 (5th Cir. 1978) 26

United States v. Doe,
903 F.2d 16 (D.C.Cir. 1990).....19, 23

United States v. Neuhausser,
241 F.3d 460 (6th Cir. 2001) 10

United States v. Pace,
981 F.2d 1123, 1129 (10th Cir. 1992) 15

United States v. Rhynes,
206 F.3d 349 (4th Cir. 1999) 12, 14

United States v. Zillgitt,
286 F. 3d 128 (2nd Cir. 2002).....7, 8, 9, 14

STATUTES

28 U.S.C. § 1254.....1

28 U.S.C. § 2255.....i, 3, 4, 7, 8, 20, 21, 24

CONSTITUTION

U.S. CONST. Amend. VI 17

OPINIONS BELOW

The district court denied relief under 28 U.S.C. § 2255 on February 22, 2001, on the basis of the Magistrate's report. In a written opinion, the district court denied rehearing on September 23, 2002. (App. A). The District Judge denied the request for a COA on October 30, 2002 (App. C). Petitioner's Motion for COA was denied by Eleventh Circuit Judges on January 8, 2003, (App. D) and the Motion for Reconsideration was denied on February 24, 2003. (App. E)

JURISDICTION

Petitioner timely filed a Motion for Relief under 28 U.S.C. § 2255 on December 28, 1999 (this Court had denied the Petition for Certiorari from the criminal conviction on January 11, 1999, No. 98-7194). Following the denial of § 2255 relief by the district court, the Petitioner timely filed a Notice of Appeal (App. B) and a Request for COA on October 24, 2002. The District Judge denied the COA on October 30, 2002. (App. C). Petitioner then sought the COA from the Eleventh Circuit. Eleventh Circuit Judges denied the COA on January 8, 2003 (App. D) and the Motion for Reconsideration on February 24, 2003. (App. E). (Based on the February 25th ruling of this Court in *Miller El v. Cockrell*, Petitioner sought Leave to File Request for Further Review on March 11, 2003, which was returned by the Clerk on April 3, 2003, as an unauthorized second request for rehearing. (App. F). This Petition for Certiorari is filed within 90 days of the Eleventh Circuit denial of the COA on February 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Original Criminal Proceeding

Marlin Davis was indicted, convicted, and sentenced under a single count for a multi-drug conspiracy:

> . . . to distribute controlled substances, that is cocaine, cocaine base (commonly known as "crack cocaine") and marijuana in violation of Title XXI of the United States Code § 841(a)(1) and (b)(1)(A)(iii).

Marlin Davis was sentenced to 360 months based upon the controlled substance (crack cocaine) with the highest penalty instead of the controlled substance with the least penalty (marijuana). Emerson Davis, Marlin's brother, and sole co-defendant at trial, was sentenced to life imprisonment on the basis of crack cocaine.

At sentencing, court appointed trial counsel did not object to the Court's sentencing or to the quantity and quality of the drugs involved notwithstanding Marlin Davis' personal on-record request for "how much marijuana," "how much cocaine," "how much crack cocaine." On direct appeal, the government counsel argued that the court appointed trial defense counsel did not properly object to judge's finding on drug quantity at the sentencing hearing.

On the direct appeal, the court-appointed appellate counsel also sought relief for denial of a fair trial because of the extensive use of Jamaican ethnicity to prove membership in a drug conspiracy and the impact of extensive prejudicial pretrial publicity. Newspaper and television reports falsely accused Emerson Davis as a Jamaican "drug king" responsible for the death of a state trooper. The government made extensive reference to "Jamaicans" (blacks

of Jamaican national origin) using "Americans" (local North Florida blacks as were five of the jurors) to show membership in the alleged conspiracy and to prejudice the right to a fair trial. Government on appeal argued trial counsel had not made an objection at trial to the use of "Jamaicans." The Eleventh Circuit affirmed without an opinion under Rule 36.1. This Court denied the Petition for Certiorari.

28 U.S.C. § 2255 Proceeding

Marlin Davis' § 2255 Motion for Relief asserted five grounds that include the issues subsequently requested in the COA. An amendment was filed to raise *Apprendi* issues. The magistrate directed the Government to respond, but did not grant the hearing requested by Davis. Davis filed an objection to magistrate's report, and also filed additional memorandum and briefs before the district court. The district court denied all relief based upon the Magistrate's order without further explanation. Davis requested a rehearing predicated upon sentencing and fair trial issues including ethnicity and the impact at trial of prejudicial pre-trial publicity.

The district court granted Davis' request to file supplemental authority from the Eleventh Circuit, *United States v. Allen*, 302 F.3d 1260 (11th Cir. 2002). *Allen* ruled that an indictment and conviction for a multi-drug conspiracy involving cocaine and marijuana was ambiguous under the record and required the sentence be based upon the substance with the least penalty. Davis had filed a Motion for a sentencing hearing that was also pending before the district court.

The district court in a written opinion ruled the conviction of Marlin Davis and Emerson Davis (Marlin's brother and sole co-defendant) for conspiracy to distribute controlled substances involving cocaine, crack cocaine, and

marijuana was not ambiguous. The court determined that the jury necessarily had found with reference to all three objects of the conspiracy and not just to one, or a combination of one of more controlled substances. As the court acknowledged, special interrogatories had not been submitted to the jury. The jury was not instructed that to be guilty of the conspiracy to distribute controlled substances, they must find guilt for all three substances. Based upon the Magistrate's prior report, the district court further ruled that the extensive use of ethnicity was for identification purposes notwithstanding identity of the defendants was not the issue at trial. The district court also ruled the failure to protect the trial from the impact of prejudicial publicity did not warrant relief.

Davis filed a Notice of Appeal and requested the COA. The District Judge denied the COA and the Eleventh Circuit judges denied the request to issue the COA. The denial in the Eleventh Circuit of the Motion for Reconsideration occurred on February 24, 2003. On February 25th this Court decided *Miller-El v. Cockrell* concerning criteria for COA. Davis promptly filed a Motion for Leave to file a request for further consideration in light of *Miller-El,* which was received by the clerk's office on March 11, 2003, and returned by the clerk as unauthorized on April 3 , 2003.

Emerson Davis, Marlin's brother and co-defendant, also had sought relief under § 2255 involving substantially the same issues. Emerson Davis' COA is pending before the Eleventh Circuit from the same opinion of the district court that denied relief to Petitioner.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. MARLIN DAVIS' COA SHOULD BE GRANTED UNDER *MILLER-EL V. COCKRELL*

There are several compelling reasons of substantial public importance why certiorari should be granted. As this Court recognized in *Miller-El v. Cockrell,* the criteria for granting COA's affects constitutional rights of thousands of persons. In particular, the constitutional right of effective assistance of counsel can best, and generally only, be protected under § 2255 relief. The COA's sentencing issue for multi-object conspiracy involve confusion and conflict among the circuits concerning general verdicts without specific jury findings. Depending upon the Circuit, substantial numbers of persons are granted relief and substantial numbers are denied relief predicated on subjective judicial determination of what the jury general verdict really meant and may not have meant. The COA issue considering ethnicity has been consistently recognized by this Court to be of great significance. The obligation of federal courts to "eradicate racial prejudice" in compliance with this Court's proclamation in *Batson v. Kentucky,* 476 U.S. 79 (1986), is frustrated and thwarted without the issuance of COA's.

Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), focuses upon whether the constitutional issues are "debatable," and not upon whether there is a reasonable probability of success or failure if the COA would be allowed.

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the district court's application of AEDPA to petitioner's constitutional claims and ask whether that

> resolution was *debatable amongst jurists of reason*. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. [Emphasis added.]

Miller-El, at 1039.

Marlin Davis will discuss the application of *Miller-El v. Cockrell* to the constitutional principles in support of the specific issues requested for the COA under two principal sections: (a) sentencing and (b) ethnicity, pretrial publicity, and fair trial.

II. MARLIN DAVIS SHOULD HAVE BEEN SENTENCED FOR THE CONTROLLED SUBSTANCE WITH LEAST PENALTY AND NOT THE HIGHEST

COA issues on sentencing can be stated thusly:

> Whether under a single count indictment and conviction for a drug "conspiracy" to distribute "cocaine, cocaine base (crack), and marijuana" should be sentenced for the substance with the least penalty in the absence of special verdicts or instructions requiring the jury to find guilt on all three substances or acquit.

Marlin Davis was indicted, convicted and sentenced to thirty years under a single count indictment:

> [T]o distribute controlled substances, that is cocaine, cocaine base (commonly known as "crack cocaine"), and marijuana, in violation of Title 21, United States Code, Section 841(a)(1), and (b)(1)(A)(iii).

This Court in *Edwards v. United States*, 523 U.S. 515 (1998) addressed the sentencing question for a conviction of drug crimes involving "cocaine and cocaine base". The instruction had used the disjunctive "or". This Court expressly observed, "a maximum sentence set by statute trumps a higher sentence set forth in the guidelines." *Edwards*, 523 U.S. at 515. In *Edwards*, this Court denied relief because the sentence did not exceed the penalty for the quantity of the drugs for substance with the least penalty.

The district court's denial of § 2255 relief was predicated on the indictment being in the conjunctive (use of "and" to link the controlled substances) and not in the disjunctive (use of "or"). Based upon a general verdict to a multi-drug indictment using "and" the Second Circuit in *United States v. Zillgitt*, 286 F. 3d 128, 131 (2002), held:

> . . . Zillgitt argues that his sentence is unconstitutional under *United States v. Barnes*, . . . in which we held that where a jury returns a general guilty verdict on a single count of conspiracy involving multiple controlled substances, the district court must sentence the defendant as if convicted of a conspiracy involving only the substance that carries the lowest statutory sentencing range. . . . We agree that Zillgitt's sentence was unconstitutional under *Barnes* and the cases upon which *Barnes* relied.
>
> Because Zillgitt did not raise these arguments either at trial or at sentencing, we

> review his claims for plain error. . . . Applying plain error review, we hold that the district court committed error, that the error was plain, that the error affected Zillgitt's substantial rights, and that the error seriously affected the fairness and the public reputation of the judicial proceedings.

The issues raised by Davis concerning sentencing constitute plain error. The constitutional sentencing issue has been raised properly by Marlin Davis in his § 2255 proceeding because the court appointed trial counsel failed to object at the time of sentencing.[1]

The district court's ruling is directly contrary to the Second Circuit's holding in *United States v. Zilliget*, 286 F. 3d 128 (2002) . Although decisions of the Second Circuit are not controlling in the Eleventh Circuit, that decision does prove the COA issue is debatable under *Miller-El v. Cockrell.*

> Under the controlling standard, a petitioner must "sho[w] that reasonable jurists

---

[1] On direct appeal of his original conviction the government argued that court appointed counsel did not object to the district court's findings or rulings at sentencing:

> Since he did not object to the amount set out in the PSR and did not challenge that amount during sentencing, he should not be allowed to raise it now for the first time. (Doc. 1384, Government's Brief, no. 96-2879, p. 44).

Marlin Davis's counsel had objected to the PSI concerning 1.5 kilos of crack cocaine, but not to any of the court's rulings and did not request or raise the issue of whether Marlin Davis should be sentenced for the drug with the least penalty at any time. The constitutional right to effective counsel at trial and at sentencing is well established and recognized. See e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *Glover v. United States*, 531 U.S. 198 (2001); and *Bell v. Cone*, 535 U.S. 685 (2002).

> could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383).

Miller-El, at 1039.

The Tenth Circuit in discussing the disjunctive vis-à-vis the conjunctive previously had entered into the debate on the side that it makes no difference:

> First, the court noted that the conspiracy count did not "refer to the five substantive offenses in the disjunctive." *Id.* at 506. This suggests that, because the allegations in the § 846 count conjunctively include all the potential illegal objectives of the conspiracy, the general conviction entails a finding of guilt as to every objective alleged. Under that reasoning, a jury could not convict a defendant of any conspiracy offense unless every alleged illegal objective of the conspiracy were proven. It is well settled that when an indictment charges a conspiracy to violate more than one statute, the jury may find the defendant guilty if it believes beyond a reasonable doubt that the defendant conspired to violate any one of the cited statutes.

Newman v. United States, 817 F. 2d 635, 638 (10th Cir. 1987).

The Tenth Circuit view was rejected by the Sixth Circuit in *United States v. Neuhausser*, 241 F.3d 460, 471 (6th Cir. 2001). The Sixth Circuit considered the use of the

disjunctive or conjunctive to be critical. The district court relied upon *Neuhausser*.

The Circuit Courts, including the Eleventh Circuit, that have addressed the issue both before and after the Supreme Court's decision in *Edwards v. United States*, 523 U.S. 511 (1998), have ruled the sentence must be based on the controlled substance imposing the least penalty. Prior to *Neuhausser*, the Sixth Circuit in *United States v. Dale*, 178 F.3d 429, 432 (6th Cir. 1999), summed up the case authority:

> Seven of the eight circuits that have directly considered this issue have decided that the punishment imposed cannot exceed the shortest maximum penalty authorized in the statutes criminalizing the multiple objects if the punishment authorized by the conspiracy statute depends on the punishment provided for the substantive offenses which were the objects of the conspiracy. That is the case here. The maximum sentence for conspiring to distribute a controlled substance depends on the controlled substance to be distributed. 21 U.S.C. § 846. Given the facts in this case, the maximum sentence for a conspiracy to distribute marijuana is five years, 21 U.S.C. § 841(b)(1)(D), while a conspiracy to distribute crack would yield a forty-year maximum sentence, 21 U.S.C. § 841(b)(1)(B).
>
> Five courts of appeals have held that when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if he distributed only the drug carrying the lower penalty. [footnotes omitted]

The Eleventh Circuit in *United States v. Riley*, 142 F.2d 1254, 1256 (1998), opined its interpretation of *Edwards*:

> The [Supreme] Court stated only two exceptions to this rule. First, if the amount of one substance involved leads to a lower statutory maximum sentence than would apply to the amount of the other substance, compare 21 U.S.C. § 841(b)(1)(A) with id. § 841(b)(1)(B), then the district court must stay below the lower statutory maximum. See *Edwards*, — U.S. at —, 118 S.Ct. at 1477. But here, both Riley and Cleveland generously exceeded the amounts required to make them eligible for life sentences under § 841(a)(1)(A), whether they are sentenced solely for crack or solely for powder. Second, a lower sentence may be warranted if the conduct involving one of the drugs is not "relevant conduct" under the Guidelines—that is, not part of the same "course of conduct or common scheme or plan as the offense of conviction."

In another recent case which involved an indictment using the disjunctive "or" the Fourth Circuit ruled the sentence must be based on the substance with the least penalty. The court commented:

> The Government did not request a special verdict form, as was its obligation. See *Barnes*, 158 F.3d at 672 ("[I]t is 'the government's responsibility to seek special verdicts.'"). With these general verdicts, it is thus impossible to determine on which statutory object or objects—sale of heroin, cocaine, cocaine base, or marijuana—the conspiracy conviction was based.

United States v. Rhynes, 206 F.3d 349, 380 (4th Cir. 1999).

In granting relief, the court in *Rhynes* did not discuss whether a multiple object conspiracy indictment that linked the controlled substances with "and" instead of "or" would be entitled to relief. Other courts, however, including the Fifth and Sixth Circuits, have considered the express use of the disjunctive "or" in either the indictment or in the instructions to be absolutely critical. Although, this exception or interpretation had not been recognized in *Edwards* which involved the conjunction "and", this was the express basis for the district court ruling from which Davis sought the COA.

> Given their instructions, the jury determined that Davis was guilty "as charged in the indictment." Unlike the ambiguous verdicts in *Allen, Dale,* and *Rhynes*, the jury's verdict here was unambiguous, indicating that Davis was found guilty of conspiring to distribute and to possess with the intent to distribute cocaine, cocaine base, and marijuana. Moreover, on appeal, the evidence was found sufficient to support that verdict. Under the circumstances, Davis's sentence did not have to be limited to the maximum allowable for an indeterminate amount of marijuana, and Davis's counsel was not ineffective for failing to argue that it did. See, e.g., United States v. Neuhausser, 241 F.3d 460, 468 (6th Cir.)(holding that, where the indictment charged the defendants with conspiring to distribute both marijuana and cocaine and where the jury was instructed in accordance with that charge, Dale was not controlling and the defendant's sentence did not need to be limited to the maximum allowable for an indeterminate amount of

marijuana), cert. denied, 122 S.Ct. 181 (2001); United States v. Green, 180 F.3d 216 (5th Cir.)(finding no ambiguity in the jury's general verdict as to a multi-substance conspiracy, and no need to limit the defendant's sentence to the substance carrying the lowest statutory penalty, where the indictment charged a conspiracy to distribute both cocaine and preludes, where the jury instructions repeatedly used the word "and" to describe the controlled substances that were the object of the conspiracy, and where the jury was at no time instructed that it could convict upon a finding of cocaine or preludes), cert. denied, 528 U.S. 1054, 120 S. Ct. 599, 145 L.Ed.2d 497 (1999).

Appendix A-6

In fact, the very ruling of the district court demonstrates that its distinction of decisions by this Court, and other courts is debatable. In *United States v. Allen*, relief was granted for conviction under an indictment involving controlled substances linked by "and". Under the jury instructions the court considered the verdict to be ambiguous.

The Davis jury, as was true of the *Allen* jury, the *Zillgitt* jury, and those in the other referenced cases, returned a general verdict.[2] The jury was *not* charged that Marlin Davis could be found guilty on the conspiracy count *only if*

---

[2] *See United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998), (government responsibility to seek special verdicts- with this general verdict, it is thus impossible to determine...). The Eleventh Circuit has cited *Barnes* "as persuasive authority." *Allen*, 302 F.3d at 1275; See *United States v. Rhynes*, 206 F.3d 349, 380 (4th Cir. 1999), (it is the government's responsibility to seek special verdict).

Marlin Davis agreed to participate with each and all three controlled substances: cocaine, crack cocaine, and marijuana. The court in *Davis* did not instruct nor did the parties argue to the jury that a failure of proof of a conspiracy as to any one of the three controlled substances, be it cocaine, cocaine base, or marijuana, would require an acquittal on Count I.

The *Davis* case focused on "drugs" and "dope" as "controlled substances." The jury was instructed it was a crime "to distribute a controlled substance" (emphasis added):

> In Count I, the defendants are charged with conspiring to distribute and to possess with the intent to distribute controlled substances, specifically cocaine, cocaine base, and marijuana.
>
> Title 21, United States Code, Section 846 makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something, which, if actually carried out, would be a violation of Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly distribute or to possess with the intent to distribute **a controlled substance**. (emphasis added).

The trial testimony of government witnesses and questions and arguments by government counsel referenced "drugs" and "dope" more than any particular controlled substance. "A controlled substance", is singular and would be satisfied by a conspiracy involving any three of the controlled substances. "Drugs", and "dope" are ambiguous as they could mean either cocaine, cocaine substance, or marijuana, or some combination thereof. Because the jury was told they could convict for a conspiracy involving "a controlled substance" and not told they must convict on all

three controlled substances or acquit, the verdict is ambiguous.

In *United States v. Pace*, 981 F.2d 1123, 1129 (10th Cir 1992), the Tenth Circuit recognized that the terms "dope" or "drugs" are ambiguous and create an unclear reference to multiple substances that could be involved in the conspiracy:

> The transcript, however, also includes approximately thirty references to "dope or "drugs", which might refer to either drug. There were few references to both drugs, including that certain chemicals are "precursors that are used to manufacture amphetamine and methamphetamine..."

In the Davis case, there were over a hundred references to "drugs" or "dope". The use of "dope" or "drugs" sometimes referred to one controlled substance and at other times two or more controlled substances.

The record of the sentencing of Marlin Davis establishes the confusion and ambiguity of whether the verdict was based upon a finding of all three or a combination of one or more controlled substances at the sentencing hearing. The Defendant personally attempted to find out.

> Your Honor, you're going to send somebody to prison for the rest of his life from what approximately seven people said. I mean, at least they can do is at least tell me how much powder cocaine I'm charged with, how much crack cocaine I'm charged with, and how much marijuana I'm charged with.

THE COURT: All right, sir. Anything else?

MR. GLAZER: No.

* * *

THE COURT: . . . But he was involved in the crimes for which he was indicted and for which he was convicted; and, that is, dealing in this crack cocaine, and that's what he's being sentenced for.

I don't know how much clearer I can be on the record, but that's the basis of this sentencing.

Marlin Davis was found guilty of "a drug conspiracy" involving "a controlled substance." The individual jurors all could have found "a drug conspiracy" with each juror finding a different controlled substance or a different combination of controlled substances. For the district court to hold that the Davis jury could not have done so violates due process under the Sixth Amendment. U.S. CONST. Amend. VI.

Under *Miller-El*, the COA should have been granted. The issue is certainly debatable as shown by the conflicts among the circuits.

III. ETHNICITY - PRETRIAL PUBLICITY - *VOIR DIRE*

The COA involving debatable constitutional questions of ethnicity, pretrial publicity, and fair trial can be stated thusly:

Whether ineffective assistance of counsel in failing to object to pervasive use of

"Jamaican(s)" by the government to prove membership in a drug conspiracy and not for purpose of physical identification of unknown persons and used by the government to prejudice the jury by blaming "Jamaican(s)" (blacks from Miami area of Jamaican national origin) using and exploiting "Americans" (local North Florida blacks, as were five of the jurors), violated Petitioner's constititutional rights.

Whether ineffective assistance of counsel, by failure to seek a change of venue, and by failure to use the opportunity afforded by the district court to conduct a meaningful *voir dire* of jurors for exposure to newspaper and television, and by failure to prevent consequence of pretrial publicity from infecting the jury trial, denied Petitioner's constitutional right to fair trial.

For decades, this Court has consistently protected the constitutional rights of criminal defendants against racially based uses of ethnicity in an affirmative effort to eradicate racial bias from the criminal justice system. *McClesky v. Kemp*, 481 U.S. 279, 309 (1987) ("[T]he jury is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"); *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) ("We have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."); *Rose v. Mitchell*, 443 U.S. 545, 555, (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.")

The denial of the COA does not "eradicate racial bias." Instead, it conceals bias and thereby nurtures its growth. The only way racism can be eradicated is to expose

it to the bright light of appellate review. This Court needs to grant certiorari to provide this light.

Marlin Davis's right to a fair trial was prejudiced by the defense counsel's failure to object to the prosecution's abuse of the ethnicity of the defendants that had been compounded by false pre-trial publicity accusing Emerson Davis (Marlin Davis's brother and sole co-defendant at trial) of being responsible for the death of the state trooper. On the initial criminal conviction appeal, the government acknowledges the ineffective assistance of the defense counsel and expressly blamed court-appointed defense counsel for their failure to object and for their reference to Jamaicans:

> Further, neither defendant objected to the prosecutor's use of the word Jamaican and in fact on cross examination, made more references to Jamaicans than did the government on direct examination. Taken in the context of the entire trial, it cannot be said either that the comments were improper or that they prejudicially affected the defendant's substantial rights. Further, by failing to object the defendants waived their right to raise this issue on appeal. United States v. Nyhuis, 8 F.3d 731, 743 (11th Cir. 1993), cert. denied, 115 S.Ct. 56 (1994).

Doc. 1384, Government's Brief, No. *96-2879, Eleventh Circuit, at 20.*

Contrary to the government's statement, the record establishes the government made far more references to Jamaicans and for the purpose of showing membership in the conspiracy. Marlin Davis' court appointed trial counsel made only one reference. This is of no moment. We would suggest and believe this Court agrees, that everyone

including the judge, the prosecutors, and the defense counsel all have a duty to avoid and eradicate use of racism, national origin, and ethnicity from all federal trials. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); see also *Doe v. United States*, 903 F.2d 16 (D.C. Cir. 1990).

The Eleventh Circuit in the prior criminal appeal did not address the ethnicity issue in its Rule 36-1 affirmation without opinion. The Eleventh Circuit has held effective assistance of counsel should not be raised on direct appeal. *United States v. Arango*, 853 F.2d 818, 823 (11th Cir. 1988) and *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000). This Court on April 23, 2003, ruled the ineffective counsel issue did not have to be raised on the direct appeal. *Massaro v. United States*, 123 S.Ct. 1690 (2003).

The "Jamaican" identity tag had two purposes: to prejudice the jury against the Jamaican defendants (Marlin Davis and his brother Emerson Davis) in light of false pretrial publicity and to prove guilt on the basis of national origin. The following four partial excerpts are from direct and re-direct of government witnesses by the prosecutor:

> Q: Okay did any of the other people of **Jamaican** descent who were up in the Garden you already testified about who were selling drugs up there, did any of them ever bring money into your house as well?
>
> A: Yes, if I'm not mistaken I think Jubee and Bounty.

Washington - Direct, Doc. 1108-6 (emphasis added).

> Q: Was there any drug dealing in the Marianna Gardens Apartments before the **Jamaicans** came?
>
> A: No sir, not that I know of.

Bailey - Redirect, Doc. 1108-194 (emphasis added).

> Q: All right. And do you know whether any of—any others are of **Jamaican** descent?
>
> A: Yes.
>
> Q: Do you know whether or not any of those people of **Jamaican** descent have been charged in federal court?
>
> A: All of them. I think most of them.

Jenkins - Redirect, Doc. 1108-243 (emphasis added).

The Magistrate without conducting a hearing ruled that Marlin Davis' § 2255 Motion was not procedurally barred but considered the references to "Jamaicans" general and merely to identify the defendants: "None of these references to ethnicity that have been cited by the Defendant are references to anything but identity." The Davis request for a hearing in the district court was also denied.

There is a constitutional difference between using color or race to physically identify an individual otherwise unknown and using color or race to identify the members of a conspiracy. Here Jamaican was the litmus test for proving membership in the charged drug conspiracy. The physical identity argument borders on being outright specious. There was not an identity issue of unknown persons—all of the witnesses who identified and testified against Marlin Davis or Emerson Davis personally knew who they were. This was not a rape victim describing an unknown attacker or a wanted bulletin physically describing a fugitive for identification by strangers.

Ethnicity was pervasively and persuasively used from the beginning to the end of the trial. Record excerpts of

the ethnicity in the trial total 22 pages. (Marlin Davis' Motion for Relief Under 28 U.S.C. § 2255, App. A)

From *voir dire* to closing arguments the government's very successful theme was bad "Jamaicans" who brought "misery" to North Florida and corrupted the "Americans" to do their dirty work. The Jamaicans were blacks from the Miami area. The Americans were also blacks. Under the record, the differentiation was made to improperly prove Jamaicans, such as Marlin Davis, were drug dealers and co-conspirators. The good "Americans" who had been "used" by the bad "Jamaicans" were local North Florida blacks or African-Americans—as were five of the jurors. Outside the presence of the jury, the following comment was made by the prosecutor.

THE COURT: Anything else?

> MR. KIRWIN: Judge, yes. Everyone danced around this record, Judge, but - I mean danced around this question, but I think for the record, or the record should reflect that there are five black Americans on this jury and that the United States of America did not issue a challenge to a single black American during the course of this jury selection process. There is a sixth black American who is one of the - alternate jurors, and the United States of American did not issue a single challenge against any black American that is seated as an alternate juror as well.

Mr. Kirwin, Doc.1108-157 (emphasis added).

The "Jamaican" versus "American" theme was invidious and effective. The following are excerpts from questions by the prosecutor:

Q: Now is Jubee an **American** or is **Jubee** a Jamaican?

A: As far as I know, he's **Jamaican**.

Matthews - Redirect, Doc. 1120-75 (emphasis added).

Q: Did Michael or Buddy, or whatever his name was, the person in that photograph there, did he have any **Americans** working for him up there in the Marianna Garden Apartments?

Matthews - Redirect, Doc. 1120-85 [Emphasis added].

Any doubt the Government utilized ethnicity "Jamaicans" versus "Americans" to prejudice the jury in violation of the constitution was removed by the Prosecutor's closing jury argument. After discussing activities of certain individuals identified as Jamaicans during the course of the trial, the Prosecutor summed things up as follows:

And what do they all do up there? Sell crack cocaine. Who do they use? Runners. The **Americans** up there sold for them.

Doc. 1112-25 [Emphasis added].

The District of Columbia upheld plain-error where the use of Jamaican ethnicity was far less pervasive than the 22-page excerpt from this trial.

But plain-error review is entirely appropriate when the matter complained of "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,"

> and that, we think, was plainly the case here. Use of ethnicity and national origin to prove guilt rises to constitutional dimension and is plain error. [Footnotes omitted].

United States v. Doe, 903 F.2d 16, 26 (D.C.Cir.1990).

The extensive use of ethnicity was plain error, directly affected Davis's substantial rights, and seriously affected the fairness and public reputation of the judicial proceedings. The use of ethnicity was prejudicial, particularly in the context of this trial and the pre-trial publicity. This pretrial publicity included explicit representations of fact that were false. Excerpts from the transcript relating to ethnicity and excerpts from the Tallahassee Democrat relating to pretrial publicity and the "Jamaican connection" were filed with the district court. *See* App. A and B attached to Marlin Davis' § 2255. Television and newspaper headlines featured the apprehension of Emerson Davis, falsely depicting him as the Jamaican gang leader responsible for the death of the state trooper, James Fulford (who at a routine traffic violation stop searched a microwave oven, intended for someone else, that exploded upon opening).

Testimony by a deputy United States Marshall at the hearing granted for Emerson Davis (Marlin Davis was not granted a hearing) further confirmed the presence of trooper James Fulford's family members at the criminal trial. The family members arrived at and departed from the courthouse in a marked highway patrol car. See Hearing on Emerson Davis § 2255 Motion Transcript Vol. 2, April 13, 2001 and Marlin Davis's Supplemental Memorandum Document 1505 and 1506.

As counsel for Marlin Davis previously has stated in documents filed in the district court, the trooper's family had every right to attend the trial and certainly every right to be

accommodated by the Florida Highway Patrol and any other citizen. The grief of the trooper's family needed closure and needed to be respected. They were the tragic victims of a crime that had been perpetrated by the Howell brothers (not the Davis brothers) whose "Jamaican" heritage was a well publicized element of the emotionally charged environment surrounding the trials.

The importance of the trooper's family being at the trial is not that it occurred, the importance is everyone knew it would occur. It had been extensively reported that the trooper's family members had attended both the state murder trials which had been moved from Monticello because of extensive pretrial publicity and the prior federal trial in Tallahassee.

There was no need for the government to remind jurors of the trooper's death. In arriving and departing the courthouse each morning and evening of the trial, the jury could not help but notice a state highway patrol car prominently parked. And no juror would think the trooper's family was present by mere coincidence or happenstance.

Defense counsel did not seek any instruction, charge or help from the court that Davis was not responsible and or involved or anything to protect the proceedings from improper prejudice. Only after the jury trial at the sentencing hearing did the district court and the prosecutor acknowledge that the Davis brothers were not involved in the trooper's death.

> MR. KIRWIN: No, sir, other than they haven't been charged with Trooper Fulford's homicide. It wasn't mentioned to the jury at any time during the course of the trial. We agreed not to bring it up.

> THE COURT: That was not an issue in this trial at all . . . . I don't think that there is any evidence that he was directly involved in this trooper's death. The government has not sought to lay that upon his shoulders. The Court does not see that he was involved in that murder

There was neither a change of venue motion filed by defense counsel nor a constitutionally adequate *voir dire*. The *voir dire* was akin to "don't ask, don't tell." Effective *voir dire* under known circumstances was an essential requirement, not an optional tactic. If there was ever prejudicial error for failing to *voir dire*, this is the case. See *Cummings v. Dugger*, 862 F.2d 1504 (11th Cir. 1989); United *States v. Davis*, 583 F.2d 190 (5th Cir. 1978). See also *United States v. Beckner*, 69 F.3d 1290, 1291 (5th 1995) ("A defendant's right to an impartial jury includes the right to an adequate *voir dire* to identify unqualified jurors" citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)).

WHEREFORE, under *Miller-El v. Cockrell*, Marlin Davis has demonstrated the threshold question that the constitutional issues, properly raised, are debatable among reasoned jurists. The COA should have been granted. This Court should grant certiorari.

W. Scott Newbern
215 South Monroe Street
Suite 303
Tallahassee, Florida 32302
850.591.1707

William VanDercreek
Counsel of Record
9441 LBJ Freeway Suite 350
Dallas, TX 75243
214.361.4005

Attorneys for Petitioner

APPENDIX INDEX

Order Denying Defendant's Motions For Rehearing And Resentencing, September 23, 2001 ..... Appendix A

Notice of Appeal, October 24, 2002 ..... Appendix B

Order Denying Defendant's Request for Certificate of Appealability, October 30, 2003 ..... Appendix C

Order Denying Petitioner's Certificate of Appealability, January 8, 2003 ..... Appendix D

Order Denying Petitioner's Motion for Reconsideration, February 24, 2003 ..... Appendix E

Denial of Leave To File Request for Further Review Pursuant to *Miller-El v. Cockrell*, April 3, 12003 ..... Appendix F

Appendix A

Order Denying Defendant's Motions For Rehearing And Resentencing, September 23, 2001

Appendix A

[Filed September 23, 2001 and docketed September 24, 2001]

IN THE UNITED STATES DISTRICT COURT FOR THE NOTHERN DISTRICT OF FLORIDA TALLAHASSE DIVISION

UNITED STATES OF AMERICA

v. 4:29cr4013

MARLIN DAVIS,

Defendant.

ORDER DENYING DEFENDANT'S MOTIONS FOR REHEARING AND RESENTENCING

Before the court are Marlin Davis's motions for rehearing (doc. 1462) and for resentencing (doc. 1536). The government has not responded to either motion. Because the court finds no merit to either motion, they will be denied.

I.

Davis was charged in a superseding indictment with one count of conspiracy to distribute and to possess with the intent to distribute "cocaine, cocaine base (commonly known as "crack cocaine"), and marijuana." Doc. 848 at 2 (emphasis added). The jurors were instructed that Davis was "charged with conspiring to distribute, and to possess with the intent to distribute cocaine, cocaine base (commonly known as crack cocaine), and marijuana." Doc. 976 at 13

(emphasis added). The jurors were also told that, to find Davis guilty of the conspiracy, they must unanimously find beyond a reasonable doubt "[t]hat two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment." Doc. 976 at 12 (emphasis added). On their verdict form, the jurors indicated that they found Davis guilty "as charged in the indictment." Doc. 978. The jurors were not instructed that they could find Davis guilty if they found that he conspired to distribute and to possess with the intent to distribute cocaine, or cocaine base, or marijuana.

Davis was sentenced to a term of 360 months in prison. The sentence was within the maximum statutory limits applicable to a cocaine or a cocaine base conspiracy but exceeded the maximum sentence for a conspiracy to distribute marijuana. At sentencing, while objecting to the quantity of drugs that was attributed to Davis, doc. 1073 at 3-4, defense counsel suggested that "there was no marijuana in this case." Doc. 1073 at 9.

Davis appealed his conviction and sentence, challenging—among other things—the sufficiency of the evidence to convict on the charged conspiracy. Doc. 1384 at 40. Davis conviction and sentence were affirmed on appeal to the United States Court of Appeals for the Eleventh Circuit, doc. 1252, and the United States Supreme Court denied *certiorari*. Doc. 1282.

On a motion for relief under 28 U.S.C. §2255, as supplemented, docs. 1325 & 1395, Davis raised a number of claims, including sentencing claims under Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt") and Edwards v. United States, 523 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) (holding that, where the government

charged the petitioners with conspiring to possess with intent to distribute cocaine and cocaine base but the district court instructed the jury that the government must prove that the conspiracy involved measurable amounts of cocaine or cocaine base, the judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the conspiracy). The magistrate judge recommended (doc. 1439) that the court deny Davis's section 2255 motion in its entirety, and this court adopted (doc. 1458) that recommendation. The clerk entered judgment (doc. 1459) on February 22, 2001, and Davis filed his motion for rehearing on March 8, 2001.

II.

Among other things, Davis suggests that, because he was charged with a multi-drug conspiracy, and because the jury returned a general verdict without a specific findings as to the type of drug(s) involved, his sentence should not have exceeded the maximum sentence (five years) for a conspiracy to distribute, and to possess with the intent to distribute, an unspecified quantity of marijuana. Davis contends that his lawyer was ineffective not only because he failed to object to the district court's use of crack cocaine as the basis for Davis's sentence but also because he advised the court at sentencing that "there was no marijuana in this case" instead of arguing for a sentence based on marijuana. Doc. 1073 at 9. To support his argument, Davis relies on the Supreme Court's dicta in Edwards v. United States and the Eleventh Circuit's recent decision in United States v. Allen. No. 00-10108, 2002 WL 1932499 (11th Cir. Aug 22, 2002).

In Edwards, a jury returned a general verdict that the defendants had conspired to distribute cocaine or cocaine base. On certiorari to the Supreme Court, the defendants argued that their sentences were unlawful, insofar as they were based on cocaine base, because the Sentencing Guidelines imposed higher penalties for the distribution of cocaine base than for the distribution of cocaine. The Court

rejected the defendants' argument, stating that "[t]he Sentencing Guidelines instruct the judge in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable—and then to impose a sentence that varies depending upon amount and kind." Edwards, 253 U.S. at 513-14. The Court noted that the outcome of the case *might* have been different if the District Court's sentence had exceeded the maximum permitted by statute for cocaine-only conspiracy. The court explained:

> Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines...But, as the Government points out, the sentences imposed here were within the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner.

Edwards, 523 U.S. at 515.

In Allen, the defendants were charged with conspiracy to distribute cocaine and marijuana. In its instructions to the jury, the district court did not state that a defendant could be found guilty of the charged conspiracy if--and only if--the jury found that the conspiracy involved both cocaine and marijuana. Instead, the word "or" crept into the instructions when the district court advised the jury that it is "a crime for anyone to knowingly possess cocaine or marijuana with the intent to distribute it." Allen, 2002 WL 1932499, at *8. Although the defendants requested a special verdict form, asking the jury whether the defendants were guilty of conspiring to distribute cocaine or conspiring to

distribute marijuana, the district court denied the request and, instead, gave the jury a general verdict form. The jury returned a verdict of guilty on the conspiracy count, and the district court sentenced the defendants using the guidelines for a cocaine conspiracy.

> On direct appeal, the Eleventh Circuit vacated the sentences based on what it called a "Dale-Rhynes violation." Allen, 2002 WL 1932499, at *12. See United States v. Dale, 178 F.3d 429 96th Cir. 1999) (holding that where the jury returned a general verdict on a charge of conspiracy to distribute both marijuana and cocaine, and where it was possible that the jury found only a marijuana conspiracy, the sentence was limited to the maximum penalty for an unspecified quantity of marijuana); United States v. Rhynes, 196 F.3d 207 (4th Cir 1999) (holding that, where there was a general verdict on a count charging a conspiracy to distribute multiple controlled substances, and where the jury was instructed that it could find the defendants guilty if they distributed any of the drugs charged as part of the conspiracy, the district court could not impose a sentence in excess of the statutory maximum for the least-punished object on which the conspiracy could have been based), vacated in part on other grounds, 218 F.3d 310 (4th Cir.), cert, denied, 530 U.S. 1222, 120 S. Ct. 2234, 147 L. Ed. 2d 263 (2000). The Eleventh Circuit wrote:
>
> At no time was the jury advised, either in the court's instructions or in the Government's argument to the jury, that before a charged Defendant could be found guilty of the conspiracy count, it must find that the Defendant had agreed to participate

> with both cocaine and marijuana. Nor did the court instruct or the parties argue to the jury that a failure of proof as to either controlled substance, be it cocaine or marijuana, would require an acquittal on Count I.

Allen, 2002 WL 1932499, at *12. The Eleventh Circuit accordingly remanded the case to the district court with instructions to grant the government the opportunity "to consent to a re-sentencing of the Defendants as to [the conspiracy count] based on maximum sentence of five years or to elect to proceed against one or more of the Defendants with a new trial on [the conspiracy count] with a special verdict." Allen, 2002 WL 1932499, at *13.

Davis's reliance on Edwards and Allen is misplaced. Here, the jurors were instructed that the indictment charged Davis, "with conspiring to distribute, and to possess with the intent to distribute cocaine, cocaine base (commonly known as crack cocaine), and marijuana." Doc. 976 at 13 (emphasis added). The jurors were also told that, to find Davis guilty of the conspiracy, they must unanimously find beyond a reasonable doubt "[t]hat two or more persons in some way or manner, came to a mutual understanding to try and accomplish a common and unlawful plan, as charged in the indictment." Doc. 976 at 12 (emphasis added). Consistent with the instructions, the jurors were asked on the verdict form whether they found Davis guilty or not guilty "as charged in the indictment." At no time were the jurors advised that a verdict of guilt could be based upon a finding that Davis conspired to distribute or to possess with the intent to distribute any of the controlled substances charged.

Given their instructions, the jury determined that Davis was guilty "as charged in the indictment." Unlike the ambiguous verdicts in Allen, Dale, and Rhynes, the jury's verdict here was unambiguous, indicating that Davis was found guilty of conspiring to distribute and to possess with the intent to distribute cocaine, cocaine base, and marijuana.

Moreover, on appeal, the evidence was found sufficient to support that verdict. Under the circumstances, Davis's sentence did not have to be limited to the maximum allowable for an indeterminate amount of marijuana, and Davis's counsel was not ineffective for failing to argue that it did. See, e.g., United States v. Neuhausser, 241 F.3d 460, 468 (6th Cir) (holding that, where the indictment charged the defendants with conspiring to distribute both marijuana and cocaine and where the jury was instructed in accordance with that charge, Dale was not controlling and the defendant's sentence did not need to be limited to the maximum allowable for an indeterminate amount of marijuana), cert. denied, 122 S. Ct. 181 (2001); United States v. Green, 180 F.3d 216 (5th Cir.) (finding no ambiguity in the jury's general verdict as to a multi-substance conspiracy, and no need to limit the defendant's sentence to the substance carrying the lowest statutory penalty, where the indictment charged a conspiracy to distribute both cocaine and preludes, where the jury instructions repeatedly used the word "and" to describe the controlled substances that were the object of the conspiracy, and where the jury was at no time instructed that it could convict upon a finding of cocaine or preludes), cert. denied, 528 U.S. 1054, 120 S. Ct. 599, 145 L. Ed. 2d 497 (1999).

III.

In his motions for rehearing and resentencing, Davis argues that his sentence is invalid under Apprendi v. New Jersey, 530 U.S. at 466, a case decided after Davis's conviction and sentence were affirmed on appeal. Although he has not abandoned or withdrawn his argument that Apprendi should be made retroactive to his case, Davis now concedes that, because the Supreme Court has not made Apprendi retroactive, he is not entitled to relief under Apprendi. Doc. 1561 at 2. See United States v. McCoy, 266 F.3d 1245 (11th Cir. 2001) (holding that Apprendi does not apply retroactively to cases on collateral review and Apprendi-error does not constitute a jurisdictional defect), cert. denied, 122 S. Ct. 2362, 153 L. Ed. 2d 183 (2002).

IV.

Davis argued in his section 2255 motion, and he continues to argue in his motion for resentencing, that his lawyer was ineffective both for failing to seek a change of venue due to pretrial publicity as well as for failing to object to the prosecution's repeated reference to the ethnicity of many of Davis's co-conspirators. After careful consideration, the magistrate judge recommended rejection of Davis's arguments in this regard. This court adopted the magistrate judge's recommendation, thereby rejecting Davis's claims of ineffective assistance based on counsel's failure to seek a change of venue and failure to object to the prosecutor's alleged abuse of the ethnicity issue. On reconsideration, this court continues to find no merit to Davis's ethnicity/pre-trial publicity arguments.

V.

Having found no merit to any of the arguments raised by Davis in his motions for rehearing and resentencing, it is so ORDERED:

Davis's motion for rehearing (doc. 1462) and motion for resentencing (doc. 1536) are DENIED.

DONE AND ORDERED this 23rd day of September 2002.

WILIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

Appendix B

Order Denying Defendant's Request for Certificate of Appealability, October 30, 2003

Appendix B

[Filed October 24, 2002]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHSSEE DIVISION

UNITED STATES OF AMERICA,

vs. CASE NO: 4:99cv522-WS
(2255 Motion)
4:29cr4013
MARLIN DAVIS, (Prior Criminal Case)

Movant,
_____/

NOTICE OF APPEAL

1. Notice is hereby given that Marlin Davis in the above named case hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order and Final Judgment that was entered on February 22, 2001. A timely Petition for Rehearing was filed on March 8, 2002 and was denied by Order and Opinion of the Court dated September 23, 2002 and entered on September 24, 2002.

2. This Notice of Appeal is filed pursuant to Rule 11 of the Rules Governing 28 U.S.C. § 2255 Cases and Rules 4(a) and 22 of the Federal Rules of Appellate Procedure. A request has been filed with the United States District Court

for a Certificate of Appealability pursuant to 28 U.S.C. § 2253.

/s/ William VanDercreek
WILLIAM VANDERCREEK
Texas Bar No. 20442000
9441 LBJ Freeway Suite 350
Dallas, TX 75243
(214) 361-4005 Tel/Fax
(850) 893-0719 Fax

W. SCOTT NEWBERN
Florida Bar No, 0098108
Post Office Box 1328
Tallahassee, Florida 32303
9820) 561-9147

Appendix C

Order Denying Defendant's Request for Certificate of Appealability, October 30, 2002

Appendix C

[Filed and Entered October 30, 2002]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. 4:92cr4013-WS
4:99cv522-WS

MARLIN DAVIS,

Defendant.

_____/

ORDER

Defendant has filed a notice of appeal, application for certificate of appealability, and supporting memorandum. Docs. 1581-1583. Defendant appeals the denial of his motion to vacate sentence pursuant to 28 U.S.C. § 2255, so a certificate of appealability is required. § 2253 (c)(1)(B); Fed.R.App.P.22(b).

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented

were "adequate to deserve encouragement to proceed further."

Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000); *quoting*, Barefoot v. Estelle, 463 U.S. 880, 893, n. 4 703 S.Ct. 3383, 3394, n.4, 77 L.Ed.2d 1090 (1983).

For the reasons set forth in the report and recommendation as adopted by the court, and the order denying motions for rehearing and resentencing, docs. 1439, 1458, and 1571. Defendant is not entitled to a certificate of appealability, as he has not made a substantial showing of the denial of a constitutional right.

It is therefore ORDERED that a certificate of appealability (doc. 1582) IS DENIED and SHALL NOT ISSUE.

DONE AND ORDERED this 29th day of October 2002.

/s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

Appendix D

Order Denying Petitioner's Certificate of Appealability, January 8, 2003

Appendix D

[Filed January 8, 2003]

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-15948-F

MARLIN DAVIS,
Petitioner-Appellant

versus

UNITED STATES OF AMERICA,
Respondent-Appellant

Appeal from the United States District Court for the Northern District of Florida

---

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

Appendix E

Order Denying Petitioner's Motion for Reconsideration, February 24, 2003

Appendix E

[Filed February 24, 2003]

IN THE UNITED STATES COURT OF APPELAS

FOR THE ELEVENTH CIRCUIT

No. 02-15948-F

MARLIN DAVIS,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Florida

---

Before: DUBINA and MARCUS, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated January 8, 2003. Appellant's motion for reconsideration is denied because he has failed to make the requisite showing. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).

Appendix F

Denial of Leave To File Request for
Further Review Pursuant to
Miller-El v. Cockrell, April 3, 2003

F - 1

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case and Number of Parties

April 03, 2003

William Vandercreek
9441 LBJ FWY STE 350
DALLAS TX 75243-4566

RE: 02-15948-F Marlin Davis v. USA
DC DKT NO.: 99-00522 CV-4-WS

The papers you recently submitted to this office are being returned for the reason stated.

A party may file only on motion for reconsideration with respect to the same order. Likewise, a party may not request reconsideration of an order disposing of a motion for reconsideration previously filed by that party.

Sincerely,

THOMAS K. KAHN, clerk

Reply To:
Mildred Norwood
(404) 335-6185

Encl.

PRO-1 (6-2002)

Supreme Court, U.S.
FILED

02179 6 MAY 23 2003

No. _____

In The
Supreme Court of the United States

MARLIN DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

W. Scott Newbern
215 South Monroe Street
Suite 303
Tallahassee, Florida 32302
850.591.1707

William VanDercreek
Counsel of Record
9441 LBJ Freeway Suite 350
Dallas, TX 75243
214.361.4005

Attorneys for Petitioner

51 pp

SUPPLEMENTAL APPENDIX INDEX

Magistrate's Report and Recommendation, entered January 8, 2001 ..... Appendix G

Order Denying Defendant's Section 2255 Motion, entered February 22, 2001 ..... Appendix H

Judgment Denying Defendant's Motion To Vacate, Set Aside, or Correct Sentence, entered February 22, 2001 ..... Appendix I

Marlin Davis' Motion For Rehearing From February 22, 2001 Order And Judgment filed March 8, 2001 ..... Appendix J

Appendix G

Magistrate's Report and Recommendation
January 8, 2001

Appendix G

[Entered January 8, 2001]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. 4:92cr4013-WS
4:99cv522-WS

MARLIN DAVIS,

Defendant.

_____/

REPORT AND RECOMMENDATION

Pending in this case is a motion to vacate and set aside a sentence filed pursuant to 28 U.S.C. § 2255. Docs. 1325 and 1326 (memorandum). The United States filed a response. Doc. 1369. Defendant filed a reply. Doc. 1382. Defendant also filed the briefs on direct appeal. Doc. 1384.

Also pending is Defendant's motion to interview the jurors concerning their exposure to pretrial publicity. Doc. 1383. This motion relates to grounds three through five in the § 2255 motion. The government objects. Doc. 1415.

Finally, a motion to file a supplemental amendment to bring a claim based upon Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) is pending. Doc. 1395. The amended claim has been docketed as document 1394. The Government does not oppose the motion

to amend. Doc. 1415.

Ground One

The indictment charged in Count I that Defendant conspired with others to possess with intent to distribute marijuana, cocaine, and crack cocaine in violation of 21 U.S.C § § 841(a)(1) and (b)(1)(A)(iii). Doc. 848 (indictment), p.2. A general verdict was returned without specifying which of the three illegal substances was the object of Defendant Marlin Davis's conspiracy, or what amounts. Defendant was sentenced for crack cocaine, the illegal substance with the highest statutory maximum sentence.

Defendant contends that he was deprived of effective assistance of counsel because his trial lawyer did not object that he should have been sentenced based upon the lowest statutory maximum sentence, the sentence for marijuana. The claim arises from Edwards v. United States, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998), a case decided two years after Defendant's trial. The issue was not raised on direct appeal either, though Petitioner had the same attorney who now represents him in this § 2255 motion and Edwards was decided while the appeal was still pending.[1]

A claim of the ineffective assistance of counsel requires proof of both attorney error and prejudice to the outcome. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2D 674 (1984). With regard to attorney error, "[t]he court must...determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance...[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and

[1] Edwards was decided on April 28, 1998. Defendant's conviction was affirmed on June 26, 1988, and rehearing was denied on August 25, 1998. Docs. 1250 and 1252.

made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689, 104 S.Ct. at 2065. "[E]very effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

To show prejudice, a claimant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2068. Failure to demonstrate either inadequate performance or prejudice to the outcome is dispositive of the claim against the petitioner. 466 U.S. at 697, 104 S.Ct. at 2069.

Defendant Marlin Davis's trial was held from February 26, 1996, through March 8, 1996. Doc. 1044-1112 and 1120. Edwards involved a charge of conspiracy to distribute both cocaine and cocaine base. 532 U.S. at 512-513, 118 S.Ct. at 1476. The jury was instructed that they could convict of the conspiracy charge if the conspiracy involved cocaine *or* cocaine base. A general verdict was returned, and the trial court imposed a sentence based upon involvement with both cocaine and cocaine base. *Id.*, 118 S.Ct. at 1477. The defendant argued he should have been sentenced for cocaine only since the jury was permitted to convict for cocaine *or* crack cocaine, and it was impossible to tell upon which the verdict was based. The Court held, however, that the Sentencing Guidelines provide that the judge determines the amount and types of drugs for purposes of sentencing. 532 U.S. at 513-514, 118 S.Ct. at 1477.

Defendant then argued that the judge must assume the more lenient the verdict, that the jury convicted only of

cocaine. 532 U.S. at 514, 118 S.Ct. at 1477. The Court held, however, that the judge must also consider relevant conduct. *Id.* It then found that the amount of cocaine, considered separately, was enough so that the sentence imposed was under the maximum authorized by statute for a cocaine only conspiracy. 532 U.S. at 515, 118 S.Ct. at 1478. In so doing, it pointed out that the "statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permitted for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." *Id.*, 118 S.Ct. at 1477.

The Edwards case has been applied in one case in this circuit, a case also decided two years after Defendant's trial, but while Defendant's appeal was still pending. United States v. Riley, 142 F.3d 1254 (11th Cir. 1998).[2] In Riley, the defendants challenged their sentences on direct appeal because they were convicted by a general verdict of a conspiracy involving both powder cocaine and crack cocaine. No request for a special verdict had been made, so the court reviewed for plain error. 142 F.3d at 1255. The trial court had found that defendant Riley was involved with two kilograms of crack cocaine and twelve kilograms of powder cocaine which, when combined and given a marijuana equivalency, produced a base offense level of 38. *Id.* Riley argued that the court had to assume that he had been convicted of a conspiracy involving the powder cocaine only. *Id.*

The court found these facts indistinguishable from Edwards. *Id.* Since neither Riley nor his codefendant contended "that either crack or powder was absent from their course of conduct," and since the evidence was "overwhelming" that they processed powder cocaine into crack cocaine, the court found no error. *Id.* 1256-1257.

---

[2] Riley was decide on June 3, 1998.

The only other case of importance in this circuit seems to be United States v. Dennis, 786 F.3d 1029 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987), a pre-Guidelines case decided long before Defendant's trial. In that case, the defendant was charged with a conspiracy to possess with intent to distribute heroin, marijuana, cocaine, and Talwin.[3] 786 F.2d at 1037. If either heroin or cocaine had been the object, the maximum sentence was 15 years, but if marijuana was the object, the maximum was 5 years. *Id.* at 1038. Defendants had unsuccessfully sought a special verdict, specifying which drugs were found to have been the object of the conspiracy, and this was raised as error. The court said:

> Where a section 846 conspiracy count charges the defendants with conspiring to distribute two or more drugs for which Congress has prescribed different ranges within which the sentence imposed may fall, the trial judge should, by use of a special interrogatory or otherwise, require the jury to return a verdict on the conspiracy count that will indicate clearly on its face which of the charged drugs the defendants were found by the jury to have conspired to distribute. In the absence of such a verdict, it may well be impossible in many cases for the sentencing judge to determine which drugs the jury found to have been involved.

786 F.2D at 1038.

But the court also found no error since "the evidence is overwhelming" that the object of the conspiracy was heroin and cocaine, and no evidence had been identified that the conspiracy was limited to drugs for which a maximum

---

[3] Talwin is a pain medication. United States v. Mahar, 801 F.2d 1477, 1486 (6th Cir. 1986).

sentence of 5 years was authorized. *Id.* The court warned, however, that if evidence had been submitted relating to "both marijuana and heroin or cocaine," then the verdict would be ambiguous. *Id.* at 1041. The court did not specify the remedy.

There have been a number of cases from the circuits addressing this question, both before and after Edwards. These need not be examined here, however, as it is plain that ineffective assistance of counsel has not been shown.[4] Edwards made it clear that the sentencing judge determines drug types and amounts, and said that there would be a problem only if there was evidence that one of the objects of the conspiracy was a controlled substance for which there was a statutory maximum sentence lower than the sentence imposed.

Defendant makes no argument that the evidence concerning powder cocaine, as an object of the conspiracy was insufficient to authorize a maximum sentence of life imprisonment. The c laim, therefore, depends entirely upon the marijuana evidence.

Defendant argues that the Government submitted evidence to the jury that the conspiracy had as its object the distribution of marijuana. Doc. 1326, p. 2. Cited for this are the following portions of the transcript: Doc. 1105 (vol.), pp. 132, 139, 151, 152; doc. 1107 (vol. 7), pp. 192, 212: doc 1120 (vol.8), pp. 17, 18, 19, 27; doc. 1110 (vol. 11), p. 224. The testimony on these pages has been carefully examined and it only concerns personal possession or use of marijuana by the witnesses, evidence which was elicited not by the Government, but on cross-examination by attorneys for Defendants to discredit the witnesses. The one exception is

---

[4] It is arguable that the claim should be directed to appellate counsel, for failing to argue Edwards and Riley while the appeal was still pending. Still however, neither attorney, trial or appellate, committed attorney error because the claim was without merit.

testimony of Gregory Matthews, where he admitted to "selling" and smoking marijuana, but again this was elicited by Defendants in an attempt to discredit Matthews. Doc. 1120, p. 16. It was not evidence presented by the Government. The citation to page 224 of doc. 1110 is a reference to the use of marijuana by Government witness Lee Roy Smith. Although it was revealed by the Government on redirect, it was merely a rehash of the same sort of discrediting testimony brought out on cross examination. Doc. 110, p. 219.

In short, while a different case might be presented had the Government presented any evidence of a conspiracy to possess with intent to distribute marijuana, here the Government put on *no* evidence that marijuana was an object of the conspiracy.[5] Thus, there is no ambiguity about the jury verdict to with respect to whether the jury could have found that Defendant conspired to possess with intent to distribute marijuana.

Stated another way, had Defendant been charged only with a conspiracy to possess with the intent to distribute marijuana, he would have been entitled to a judgment of acquittal. The jury, therefore, must have convicted him only of involvement with cocaine and crack cocaine.

Consequently, the concession of sentencing by Defendant's attorney, that there was no marijuana in this case, was not attorney error. Nor could there have been prejudice to the outcome, given the status of the record discussed above. The was no evidence at all that marijuana was the object of the conspiracy.[6]

---

[5] "Judge, as far as marijuana, there was no marijuana in this case, but Count I mentions that he was also convicted of intent to distribute marijuana." Doc. 1073 (vol. 14, sentencing transcript), p. 9.

[6] This distinguishes the result recommended by Magistrate Judge Davis in case number 3:96cr93-LAC. Doc. 165 (report and recommendation), attached to doc. 1419 as supplemental authority. Apparently in that case there was *some* evidence that distribution of the with the lower penalty,

Ground Two

Defendant contends that his trial attorney was ineffective for failing to object to the lack of adequate specify of the court's findings that he was involved with at least 1.5 kilograms of crack cocaine, and to the two level enhancement for firearms. Such objections must be made at the end of sentencing as required by United States v. Jones, 899 F.2d 1097 (11th Cir. 1990). Doc. 1326, p.6; doc. 1382, pp. 3-4 ("if court appointed counsel had objected stating the particulars as required by *Jones*, the trial court would have been required to make appropriate and specific findings.")

On direct appeal, the Government argued that the question of drug quantity for sentencing was not preserved by an objection at sentencing, and then argued that the claim could not be raised for the first time on direct appeal. Doc. 1384, Government's brief on appeal, p. 44 (Since he did not object to the amount set out in the PSR and did into challenge that amount during sentencing, he should not be allowed to raise it now for the first time.") The Eleventh Circuit affirmed without opinion. Doc. 1252.

In response to this § 2255 claim, the Government now points out that Defendant's attorney did object at sentencing to the quantity of crack cocaine attributed to Defendant by the presentence report.[7] Doc. 1369, p. 5. Defendant's attorney challenged the drug quantities and his agreement to participate in the broader conspiracy. Doc. 1073 (vol. 14), sentencing transcript), pp. 3-4, 13-14. The firearm

---

amphetamine, was the object of the conspiracy. The report and recommendation has not yet been adopted by Judge Collier.

[7] If an objection concerning a sentencing factor is clearly made during sentencing, that objection need not be repeated at the end of sentencing to preserve the basic claim for appellate review. United States v. Maurice, 69 F.3d 1553, 1557 (11th Cir. 1995) (emphasis added, footnote omitted). The claim here, however, is procedural, to the specificity of the court's findings. There was no objection at all to that.

enhancement was not mentioned by counsel at sentencing, however. *Id.* Further, Defendant's counsel did not object after sentencing to the court's findings as to the question of drug quantities and the firearm enhancement. *Id.*, p. 25.

"[A] member of a drug conspiracy is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity." United States v. Lee, 68 F.3d 1267, 1274 (11th cir. 1995), *quoting*, United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993). "[T]o determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant. Once the extent of a defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation. *If the court does not make individualized findings, the sentence may nevertheless be upheld if the record supports the amount of drugs attributed to a defendant.*" *Id.*, 68 F.3d. at 1274-1275, *quoting*, Ismond, 993 F.2d at 1499 (emphasis added).

Thus, even if Defendant's attorney had objected to the court's findings at the end of sentencing, and assuming those findings were incomplete, the Eleventh Circuit would have reversed only if the record did not support the amount of crack cocaine or the firearm enhancement found by the court. To show the sort of prejudice now, Defendant must come forward with detailed argument pointing the record to show that the result would have been different if his trial lawyer had made the objection which his § 2255 lawyer now makes. *See*, Reece v. United States, 119 F.3D 1462, 1468 (11th Cir. 1997) (defendant could satisfy Strickland burden to show prejudice "only if he represents that, given an evidentiary hearing, he can establish that the methamphetamine he possessed and distributed was the L-type. Reece makes no such representation.").

Defendant has not made such a showing. As to drug quantity, the Government argued at sentencing that Defendant was responsible for:

(1) One kilogram of crack cocaine stored at the residence of the sister of Michelle Kennedy. Doc. 1073, p. 10 (testimony of Gregory Matthews).

(2) Kilogram quantities of both powder and crack cocaine distributed to Jimmy Nixon. *Id.*, p. 11 (testimony of Jimmy Nixon).

(3) One kilogram of crack cocaine brought to Wadley, Georgia. *Id.* (testimony of Michelle Kennedy and Leroy Smith)

(4) Between one-quarter and one-half kilogram of crack cocaine transported by Gregory Matthews and Defendant from South Florida to Marianna, Florida. *Id.* (testimony of Gregory Matthews).

(5) At least four trips carrying various amounts of crack cocaine from South Florida to Wadley, Georgia. *Id.* (testimony of Telly Savales Carswell).

In his motion but not in either memorandum, Defendant only contests the findings as to items (3) and (4) above. Doc. 1, p. 5. Even if the 1.5 kilograms of crack cocaine potentially evidenced by the testimony described in paragraphs (3) and (4) had been disbelieved by the court. Defendant has not shown that the record would not have otherwise supported a finding that Defendant was involved with at least 1.5 kilograms of crack cocaine based upon the evidence described in items (1), (2) and (5).

The firearm enhancement claim suffers the same fate. During sentencing, the Government said that Defendant was responsible for firearms due to the testimony of Gregory Matthews. The Government said that Gregory Matthews,

Emerson Davis, and Defendant went to Michelle Kennedy's sister's house to retrieve a kilogram of crack cocaine which had been given to Michelle Kennedy to store, and Matthews and Emerson Davis brandished firearms. Doc. 1073, p. 10. In his motion, Defendant sets forth some of the testimony of Gregory Matthews. Doc. 1325, p. 6. In this testimony, Matthews said that he and Emerson Davis went to Kennedy's sister's house armed with handguns, and he said "Marlin was there too, but I can't place him with a gun." *Id.* Matthews then said "Nothing really happened. We didn't have any gunplay or anything. We just go in there, you know." *Id.*, p. 7.

This exposition of evidence is incomplete. Gregory Matthews said that in 1991, Emerson Davis (Mercy) had asked Michelle Kennedy to keep some "dope" at Kennedy's sister's house. Doc. 1107 (vol. 7), pp. 155-156, 158. He said "they" had returned from Marianna and Michelle Kennedy was "missing." *Id.*, p. 156. Matthews then said that "[n]ormally when we leave Fort Lauderdale, I travel with my gun, he [Emerson Davis] travel with his. I don't know about Marlin." Doc. 1107 (vol. 7), p. 157. They both had "Glocks." *Id.* Matthews said Emerson Davis told them:

> Any sign of anybody else that know about us and our doings show up around there or anything while we trying to get this back, we were – anything come up, any action had to be taken, it was gonna go, you know.

Id., pp. 157-158. In other words, while Matthews did not say that the guns were brandished, it is plain that Emerson Davis told Matthews and Defendant that the guns were to be used if any trouble started as they retrieved the cocaine.

Second, at sentencing the Government said that Jimmy Nixon had testified that Defendant himself carried a pistol. *Id.*, p. 11. Defendant has not argued that this testimony was insufficient for the court's findings.

The court reasoned that Defendant was accountable for the firearms in the possession of Emerson Davis and Gregory Matthews, finding: "Certainly, he was present with two other coconspirators who had weapons." *Id.*, p. 16. The only way this finding might have been successfully challenged on appeal would have been if Defendant had come forward with some record evidence that he could not have reasonably foreseen that Matthews and Emerson Davis were carrying firearms when all three went to retrieve the cocaine. Actual knowledge is not necessary, as long as the coconspirator's firearm possession in the furtherance of the conspiracy and was reasonably foreseeable to the defendant. United States v. Gallo, 195 F. 3d 1278, 1284 (11th Cir. 1999). Defendant has not made such a showing. The evidence at trial showed that all three knew what they were doing that day, and that Emerson Davis and Gregory Matthews were armed and prepared to shoot if there was any trouble. Further, there is the testimony of Jimmy Nixon, which has not been challenged at all.[8] Ground two, therefore, is without merit.

Ground Three

Defendant contends that his trial attorney was ineffective for failing to object to numerous references to the ethnicity of Defendants and other conspirators. Defendants and their associates in the crack cocaine trade were frequently called "Jamaicans," while convicted drug dealers who were from North Florida or Georgia were called "Americans." Defendant contends that his attorney committed error by failing to object, and argues that the lack of an objection caused prejudice at trial.

---

[8] *Cf.*, Castillo v. United States, 200 F. 3d 735, 737 and n. 2 (11th Cir. 2000), *cert. denied*, __ S. Ct. __, 121 S. Ct. 114 (2000) (upholding a § 924(c) conviction, finding it "reasonably foreseeable that [the codefendant] would carry a firearm because, as we have previously stated, 'weapons have become tools of the trade for those involved in the distribution of illegal drugs.'") (citation omitted).

The Government argues that since the *fair trial claim* was raised on direct appeal, it cannot be considered on this § 2255 motion. Doc. 1369. That, of course, is not the claim now. The ineffective assistance of counsel claim faults counsel for not preserving the standard of review on appeal.[9] The Government did not address the merits of the ineffective assistance of counsel claim. The claim now before the court, however, is governed by Strickland. To reiterate, to show prejudice a claimant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2068.

The Government did repeatedly ask witnesses to testify as to whether various members of the conspiracy were of Jamaican heritage. Defendant has cited a number of cases which express disapproval where there has been a danger that the jury might convict for ethnicity rather than actual guilt. But the court's task on this post-conviction motion is to ask:

---

[9] A *preserved* claim that a trial court's ruling has deprived a defendant of a fundamentally fair trial is reviewed for an abuse of discretion. United States v. Mayes, 158 F.3d 1215, 1219 (11th Cir. 1998), *cert. denied*, 525 U.S. 1185 (1999). "The abuse of discretion standard has been described as allowing a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989). The fair trial claim, however, was not preserved by an objection by Defendant's attorney, and therefore it was reviewed for plain error. United States v. Hernandez, 896 F.2d 513, 523 (11th Cir.), *cert. denied*, 498 U.S. 858 (1990); doc. 1384, brief on appeal, p. 10. Plain error has four requirements. "First, there must be an error. Second, the error must be plain. Third, the error must affect substantial rights of the defendant. Fourth, the error must seriously affect the fairness, integrity, or public reputation of a judicial proceeding." United States v. Humphrey, 164 F.3d 585, 588 n. 3 (11th Cir. 1999), citing, United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993). The Eleventh Circuit's per curiam denial of this claim must have used the plain error standard.

If Defendant's attorney had objected at the outset, and if the court had sustained the objection and instructed the Government to stay completely away from references to Jamaican heritage. Defendant has cited a number of cases which express disapproval where there has been a danger that the jury might convict for ethnicity rather than actual guilt. But the court's task on this post-conviction motion is to ask: If Defendant's attorney had objected at the outset, and if the court had sustained the objection and instructed the Government to stay completely away from references to Jamaican heritage, is there a "reasonable probability" that the outcome for Defendant would have been different? The court cannot tell. Defendant does not discuss the evidence against him at all. Stated another way, Defendant has not laid out the evidence against him by specific references to the record to show that it was insufficient to convict of conspiracy without the repeated references to Jamaicans. Defendant must come forward with evidence or argument which his lawyer should have presented which probably would have changed the outcome. Defendant cannot just generally allege prejudice. Reece, *supra*.

The undersigned did not hear the evidence in this case and has not read all of the transcripts. But the description by the parties of the evidence at trial is in the appellate briefs and is presumptively accurate. Doc. 1384, Defendant's initial brief, pp. 4-10; Government's brief, pp. 4-12. There was evidence that Marlin Davis worked for Emerson Davis in the sale of crack cocaine in Marianna, Florida. Government's brief, p. 8. He also sold crack cocaine through Patricia Clark and Jimmy Nixon in Savannah, Georgia, and he arranged for Nixon to purchase a kilogram of cocaine from Emerson Davis. *Id.* He helped Gregory Matthews take cocaine to Emerson Davis in Marianna. *Id.* He also helped stash cocaine and guarded money. *Id.*, p. 9. When Emerson Davis could not find cocaine from his usual sources, he bought from Marlin Davis. *Id.* Marlin Davis was seen both counting money for Emerson Davis and bagging up the

drugs. *Id.* He helped Gregory Matthews and Emerson Davis go to Michelle Kennedy's house to retrieve cocaine which Emerson Davis feared was stolen from him. *Id.* Marlin Davis talked with Emerson Davis and Gregory Matthews about expanding the business to Georgia. *Id.* He employed Telly Savalas Carswell to sell drugs for him in Wadley, Georgia. *Id.*, pp. 9-10. Defendant has not discussed any of this evidence to show that the testimony was weak in any respect.

Finally, "[a]n unembellished reference to evidence of race simply as a factor bolstering an eyewitness identification of a culprit . . . poses no threat to purity of the trial. The line is crossed, however, when the argument shifts its emphasis from evidence to emotion." United States v. Cabrera, 222 F.3d 590, 595 (9th Cir. 2000), *quoting*, United States v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990). In Doe, the court described the testimony as follows:

> Rawls [the police witness] avowed that "the retail market has been taken over basically by Jamaicans," and that "the local dealers were being replaced . . . by groups of people that were coming in from other places," who "in many cases" were Jamaicans. These statements hardly described for the jury the modus operandi of drug dealers, Jamaican or otherwise, nor could they have provided legitimate assistance to the jurors in determining whether appellants committed the offense charged. Instead, they focused on monopolization of the local drug market by dealers tracing their ancestry to Jamaica, and strongly suggested that appellants were guilty because two of them are Jamaican.

903 F.2d at 20.

This case, however, is not like the Doe case. There was no opinion testimony in this case about the take-over of the local drug market by dealers of Jamaican ancestry. Even though there were a number of references to the Jamaican heritage of certain witnesses or co-conspirators, to "American dudes" by other witnesses, and to nicknames, the purpose was mere identification of persons or, as brought out by defendants, the explanation of a nickname. All of the members of the conspiracy who came to Marianna from Fort Lauderdale were of Jamaican heritage. Doc. 1384. Government's brief, p. 7. This was an identifying factor which would have been difficult to avoid at trial. Jamaican English is distinctly different from the Southern speech of many black residents of Jackson County, Florida.[10] Witnesses who saw these persons selling drugs unavoidably would have noted their skin color, gender, size, age, and regional accent. None of the references to ethnicity that have been cited by Defendant are references to anything but identity. At no point was there any reference to ethnicity which suggested that Defendant was probably guilty due to his ethnicity. It is true that the jury could have concluded from the evidence that the members of this conspiracy took over the local drug market, but it was not because they were Jamaicans. It is very doubtful that the jury would have concluded that Defendant Marlin Davis was guilty of a conspiracy with the others merely because he had come from Jamaica. Ground three, therefore, is without merit.

Grounds Four and Five

The next two grounds are related and should be considered together. In ground four, Defendant contends that his attorney was ineffective for failing to seek a change of venue due to pretrial publicity. Defendant contends that newspaper articles had falsely accused Defendant's brother and co-defendant, Emerson Davis, of murdering Florida State

---

[10] Marianna, Florida, is the county seat of Jackson County.

Trooper Fulford. He also argues that the newspaper publicity caused him prejudice by alleging that he was a member of a Jamaican gang which had caused the trooper's death. Finally, Defendant asserts prejudice because the mother and widow of the murdered trooper attended his trial.

On June 9, 1995, an article was published on the front page of the Tallahassee Democrat. Doc. 1325, p. 13. It was entitled "A Final Arrest in Trooper's Murder," and described the arrest of Emerson Davis. The article quoted Supervisory Investigator Harry A. Layne, speaking for the United States Marshals Service in Tallahassee, saying that Emerson Davis "ordered the construction of a pipe bomb to kill two female members of his drug group in 1992." The article further described Emerson Davis as "a primary leader of the Jamaican drug gang based in Fort Lauderdale that ordered the pipe-bomb execution." The article said that Paul Howell had been convicted of the murder and sentenced to death.

A second article is also described in the motion. The article ran on the front page of the Tallahassee Democrat on September 27, 1994. *Id.*, pp. 14-15. The article discussed a change of venue in the state trial of the Howell brothers. The trial was originally set for Monticello, in Jefferson County, Florida. A resident of Monticello was quoted as being relieved that the trial would be moved to another venue, stating "[t]his is any awfully small town and it's just a very emotional matter right now." *Id.*, p. 15. The article further mentioned "two articles in Sunday's Tallahassee Democrat, one of which 'proceeds to link the defendants to a Jamaican posse who may attempt a rescue,' and 'the other article (which) makes as a central feature the allegedly racially prejudicial sentiment in the community." *Id.*

A third newspaper article was described in the motion. It was dated September 18, 1994, on the front page of the Sunday Democrat. The gist of the headline was that the widow of Trooper Fulford could find "lost peace of mind" because the Howell brothers were going to trial for the

murder of Fulford. *Id.*, p. 15. The article quoted Fulford's widows as saying: "She says she wants brothers Patrick and Paul Howell to die in the electric chair." *Id.* The article stated that the Howells "were members of a Jamaican drug ring responsible for three deaths in a six-month period." *Id.*, p. 16. The article stated that Fulford's widow had attended the eight week federal trial in May and June, 1993, and planned to attend this state trial. *Id.* The article concluded that "[t]he Howells were among eight Jamaicans who were handed life sentences in that trial." *Id.*

Copies of all of the newspaper articles are attached as Appendix B to the motion. The one closest in time to the trial in this case is the first one, June 15, 1995. All of the rest, for the most part, are dated in the fall of 1994. In summary, there was a lot of newspaper coverage of the story in the fall of 1994, but only two articles in 1995, one on January 11, 1995, and the last described above, when Emerson Davis was arrested, dated June 9, 1995, over eight months before Defendant's trial.

In ground five, Defendant contends that his attorney was ineffective for failing to conduct sufficient voir dire of the prospective jurors regarding pretrial publicity. Defendant contends that one member of the jury was an employee of the Tallahassee Democrat, but no questions were asked of that juror outside the hearing of other prospective jurors as to whether she had learned of the newspaper articles through her employment. He alleges that other jurors subscribed to the Tallahassee Democrat, but they were not asked if they had read the articles.

The transcript of the selection of the jury reveals that the court first described the nature of the charges against Defendants. Doc. 1104, vol. 4, pp. 5-6. The court then said it would name the witnesses who might be called. *Id.*, p. 6. The court said "I asked the lawyers to give me the names, so when the jury is being selected, that if there is something about one of these names that provokes some response on

your part, makes you think that you could not be a fair and impartial juror, you should let us know." *Id.* The court had already identified Emerson Davis and Marlin Davis as the defendants. *Id.*, p. 5. After reading the extensive potential witness list, which contained the name of Patrick Howell, the court set forth the expected length of the trial and then said: "Is there anybody seated in the jury box who believes they have a good reason why they cannot be here to be a juror in this case?" *Id.*, p. 13. That question elicited a response from one juror concerning hardship. *Id.*, pp. 13-14. None of the seated jurors then came forward with anything concerning the nature of the charges or the names of the prospective witnesses to indicate any misgivings about serving.

When the first twelve prospective jurors were seated, Defendant's attorney, Steve Glazar, asked if any of them subscribed to the Tallahassee Democrat. Of the jurors eventually selected, Jurors Brooks, Colson, and Andrews said that they subscribed to the Tallahassee Democrat. Doc. 1104, vol. 4, p. 41. The question was not asked of the other jurors who were seated after the first six were excused. Mr. Glazar asked no questions of Brooks, Colson or Andrews concerning their reading habits of the Tallahassee Democrat.

At one point, prospective juror Carl Tucker revealed that he worked at the Federal Detention Center (FDC) at FCI Tallahassee. Doc. 1104, vol. 4, p. 90. The attorney for Emerson Davis, Timothy Jansen, said that while he did not want to ask questions of everyone on the record, he thought that Tucker should be asked if he had seen Defendants at the Federal Detention Center or whether he was "aware of the other trial and that Howell is related to these people." *Id.*, p. 97. Tucker was examined in a side-bar conference. *Id.*, p. 98. He said that "the Howells that are in this, I do remember them from the sentencing that we had." *Id.* He remembered both Patrick and Paul Howell. *Id.* The court excused Tucker. *Id.*, pp. 98-99.

Prospective juror Maureen Turner revealed that she

worked at the Tallahassee Democrat in accounting. *Id.*, pp. 138, 144. At side-bar, Mr. Jansen objected to seating Ms. Turner, arguing that she would have knowledge of the Howell case because "the trooper killing case was in the newspaper." *Id.*, p. 145. He asked the court to inquire as to whether she knew the name "Patrick Howell." *Id.*, p. 146. The Government argued that she was in accounting, and warned that asking the question would "undo the thing," that is, the Government's efforts to keep the death of Trooper Fulford out of the case. *Id.* Defendant Marlin Davis's lawyer then pointed out that "[i]t's a two-edge sword. If you ask her whether she knows –" *Id.* Mr. Jansen's request was withdrawn when the Government said it did not intend to call Patrick Howell as a witness. *Id.*, p. 147.

Also related to this claim is Defendant's motion for leave to interview jurors. Doc. 1383. Defendant contends that he cannot fairly make his claims without knowing whether any of the jurors had been exposed to media coverage. The Government filed a response opposing the motion. Doc. 1415.

The Government argues that the change of venue claim, the underlying claim in ground four, is procedurally barred. Doc. 1369, p. 2. The question of change of venue was not raised on direct appeal by Marlin Davis. Emerson Davis argued on direct appeal that the court should have changed venue *sua sponte*, and the Government argued that the claim would be reviewed for plain error. Doc. 1384., Government's brief, p. 47. Again, however, it does not matter that the underlying claim is procedurally barred. The claim here is alleged ineffective assistance of counsel causing the procedural default.

The Government also argues that the underlying claim concerning voir dire of prospective jurors is not cognizable on a § 2255 motion. Doc. 1369, p. 3. Again, the argument is not persuasive since the claim before the court is that counsel was ineffective assistance as to voir dire.

Turning to the merits, the constitution requires that jurors in a criminal trial be impartial. Murphy v. Florida, 421 U.S. 803, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). But the jurors "need not . . . be totally ignorant of the facts and issues involved." 421 U.S. at 800, 95 S.Ct. at 2036. It is not enough if "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*, quoting Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). Some exposure to pretrial publicity does not create an automatic presumption of prejudice. United States v. Alvarez, 755 F.2d 830, 859 (11th Cir. 1985).

Thus, there are two standards for determining a motion to change venue due to pretrial publicity: actual prejudice and presumed prejudice. Cummings v. Dugger, 862 F.2d 1504, 1509 (11th Cir. 1989). Actual prejudice requires proof that one or more jurors "entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty," and those jurors "could not have laid aside these preformed opinions" and rendered a verdict based upon the evidence. *Id.* Defendant here must proceed on the theory of presumed prejudice as there is no evidence that any juror was actually prejudiced.

"Prejudice is presumed from pretrial publicity when (1) pretrial publicity is sufficiently prejudicial and inflammatory, and (2) the prejudicial pretrial publicity saturated the community where the trials were held." *Id.*, *quoting* Coleman v. Zant, 708 F.2d 541, 544-545 (11th Cir. 1983); Bundy v. Dugger, 850 F.2d 1402, 1424 (11th Cir. 1988). "This principle is rarely applicable and reserved for extreme situations where pretrial publicity renders 'virtually impossible a fair trial by an impartial jury drawn from the community.'" Bundy v. Dugger, 850 F.2d at 1424, *quoting* Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981).

Defendant has not shown that it was impossible to

obtain a fair jury in his case, nor has he shown that his attorney was ineffective either in failing to move for a change of venue or in failing to conduct more extensive voir dire of prospective jurors. The most recent article was on June 9, 1995, eight months before the trial. While the June 9, 1995, article contained an inflammatory falsity, that Emerson Davis "ordered the construction of a pipe bomb to kill two female members of his drug group in 1992,"[11] there is no evidence of any coverage relating to this trial in the months before this trial began. The articles in the fall of 1994 were close to "saturation" coverage at that time, but that was nearly one and one-half years before this trial began. Further, the indictment did not charge anything connected with the murder of Trooper Fulford, and the only connection from the prior media coverage was the mention of Patrick Howell as a potential witness. Patrick Howell was not called as a witness, however. The Government was successful in keeping all references to the killing of Trooper Fulford out of the case, and the mention of a "bombing" occurred inadvertently only once.

While the number of jurors who subscribed to the Tallahassee Democrat is unknown, we know that only about half of the first panel of twelve were subscribers, and only three of those sat on the jury. Subscribers do not tend to read the entire paper each day, and not every subscriber will read the leading articles word for word or necessarily retain a memory of such articles for any length of time.

Further, at the beginning of the case the court described the nature of the charges and read the names of the witnesses, including the name of Patrick Howell, asking the prospective jurors whether the names caused them to believe that they could not serve fairly as jurors. Had any juror made the connection between this case and media coverage of the "trooper bombing" cases or the news articles about the "Jamaican posse," and had that connection caused the

---

[11] The evidence was that Paul and Patrick Howell were responsible.

prospective juror any discomfort in serving, this would have been revealed.

Since it was in the interests of Defendant to keep all references to the "trooper bombing" or a "Jamaican posse" out of this case, the court cannot say that the absence of more searching voir dire was not a sound strategic choice by Defendant's attorney. It is true that an attorney could have asked the jurors whether they had read anything in the newspaper about the charges in this case, or whether the names of the prospective witnesses triggered any such memory. Such a question could have been propounded safely, with a caution to that the prospective juror raise his or her hand as an affirmative response so that audible responses could have been taken at the bench.[12]

But still there was the possibility that the asking even these questions might have been enough to inform one of the jurors of the prejudicial connection and yet not elicit enough of a prejudicial response to justify a challenge for cause. Prospective juror Tucker was successfully challenged as much for his connection the Federal Detention Center, where most of the defendants were housed prior to the trial, as his knowledge of the connection of this case to the Howell brothers. Thus, mere knowledge of pretrial publicity might not have been enough to excuse the juror for cause, and Defendant might then have been out of peremptory challenges. It is also possible that the process of questioning about newspaper stories might have triggered a memory arising later, after hearing the evidence. In short, given the lack of saturation news coverage and the deference which the court must apply under Strickland, it cannot be said that it was attorney error not to have asked more questions about pretrial publicity or to have moved for a change of venue.

---

[12] Alternatively, the jurors could have been asked this question one by one at side-bar. Individual voir dire is preferred in these circumstances, though it is not required. Cummings v. Dugger, 862 F.2d 1504, 1508 (11th Cir.) *cert. denied,* 490 U.S. 1111 (1989).

There is also the issue of whether Defendant should be permitted now to interview the jurors to see whether such voir dire would have been fruitful. A juror may testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention . . . ." Fed.R.Evid. 606(b). The court has discretion whether to allow post-trial interviews with jurors. United States v. Dominquez, 226 F.3d 1235, 1246 (11th Cir. 2000); United states v. Hooshmand, 931 F.2d 725, 737 (11th Cir. 1991).

While the court recognizes that Defendant is in a difficult position in making his claim without discovery of this sort, there is a strong tradition of protecting the sanctity of a jury, and there first must be a threshold showing of good cause:

> No per se rule requires the trial court to investigate the internal workings of the jury whenever a defendant *asserts juror misconduct. United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984). "The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Id.* (citation omitted). To justify a post-trial hearing involving the trial's jurors, the defendant must do more than speculate; he must show "'clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred.'" *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). "The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate." *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985).

United States v. Cuthel, 903 F.2d 1381, 1382-1383 (11th Cir. 1990)

Defendant has not shown "clear, strong, substantial and incontrovertible evidence" that his jury must have been tainted by the press coverage. Over eight months had elapsed since the last article, and nearly a year and one-half since the most extensive coverage. There is no evidence that there was any news coverage at the time of this trial. It is unlikely that any of the jurors harbored any unfair preconceptions about Defendant's guilt since the court identified the prospective witnesses, including Patrick Howell, asked the jurors whether the names prompted to conclude that they could not fairly serve as jurors, and no one except Mr. Tucker came forward. In light of the lack of response to that question and the lack of "saturation" press coverage shortly before this trial, Defendant has not shown here anything more than speculation that his juror may have been unfairly prejudiced by the earlier pretrial publicity.

Thus, the motion for leave to interview jurors should be denied. Grounds four and five are without merit.

Ground Six

Defendant contends that his attorney was ineffective for failing to object to vouching and bolstering of the credibility of witnesses who were seeking a reduction of their sentences through substantial assistance motions. The Government again erroneously argues that the underlying claim should have been raised on direct appeal, and fails to address the merits of the claim that counsel was ineffective.

To prove prosecutorial misconduct, which is the underlying claim, a defendant must show that the conduct was improper, and prejudicially affected the substantial rights of the defendant. Sexton v. Howard, 55 F.3d 1557, 1559 (11th Cir. 1995), *cert. denied*, 516 U.S. 1124 (1996). "A prosecutor's vouching 'prejudicially affect[s] the substantial

rights of the defendant when [it] so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.' In deciding whether the conduct in question rises to that level, we determine whether there is a reasonable probability that, but for the conduct, the outcome of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations omitted).

Vouching occurs when the prosecutor places the Government's prestige or his own personal belief behind the credibility of the witness:

> A jury could reasonably believe the prosecutor's indications if the prosecutor either places the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity, or the prosecutor implicitly vouches for the witness' veracity by indicating that information not presented to the jury supports the testimony. In short, the government cannot argue the credibility of a witness based on the government's reputation or allude to evidence not formally before the jury.

United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991) (citations omitted). But "it is perfectly proper for a prosecutor to elicit testimony regarding the truth telling portion of a plea agreement on redirect once the credibility of the witness is attacked on cross-examination." United States v. Diaz, 190 F.3d 1247, 1254 (11th Cir. 1999), *citing* United States v. Hilton, 772 F.2d 783, 787 (11th Cir. 1985); United States v. Castro, 89 F.3d 1443 (11th Cir. 1996), *cert. denied,* 519 U.S. 1118 (1997) (questioning a witness about the requirements of a plea agreement to testify truthfully is not improper).

Some portions of the record cited by Defendant in support of this claim are no more than the prosecutor's references to the requirements of plea agreements that the witnesses tell the truth, or the lack of any agreement between the witness and the Government. Doc. 1112, vol. 13, pp. 20-21; doc. 1109, vol. 8, p. 85 (miscited as doc. 1106, vol. 6, in the memorandum); doc. 1109, vol. 10, p. 93-94; doc. 1110, vol. 11, p. 22. Some of the citations to the record are to pages upon which there is nothing that could be construed as "vouching." Doc. 1106, vol. 6, p. 191; doc. 1109, vol. 10, p. 58; doc. 1110, vol. 11, p. 164; doc. 1111, vol. 12, p. 138 (cross examination). The questions asked on redirect of Gregory Bernell Robinson simply asked Robinson whether, when he testified before the grand jury, he was "just saying anything that you wanted to say." Doc. 1109, vol. 10, p. 41. Since none of the cited comments were improper, the failure of the Defendant's attorney to object was not attorney error. Ground six is without merit.

Ground Seven

Defendant contends that Carnell Mason, a witness for the Government, committed perjury when he denied that he had been previously convicted of a felony. Defendant has shown that Mason was convicted of a felony in Savannah, Georgia in 1990.

This is a Brady[13] or a Giglio[14] claim. Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196-97. "A Brady claim is

---

[13] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[14] Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). That case, and others, held that knowing use by the Government of false testimony violates due process.

available if either exculpatory or impeachment evidence is suppressed, regardless of the good faith or bad faith of the prosecution." United States v. Fernandez, 136 F.3d 1434, 1438 (11th Cir. 1998). To show a Brady violation, Defendant must show (1) that the prosecution possessed material evidence favorable to the accused (including impeachment evidence), (2) that Defendant did not have the evidence and could not have obtained it through the exercise of due diligence, (3) that the prosecution suppressed the evidence, and (4) that a reasonable probability exists that the outcome would have been different had the evidence been disclosed. United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989), *cert. denied*, 493 U.S. 932 (1989) (citations omitted).

To establish that withheld evidence was material under Brady, Defendant must demonstrate a reasonable probability – "a probability sufficient to undermine confidence in the outcome" – that the outcome of the proceedings would have been different if the evidence had been disclosed. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); *citing* Strickland v. Washington.[15] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) (discussing Bagley). This is not a sufficiency of the evidence test; rather, a Brady violation is shown "by demonstrating that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435, 115 S.Ct. at 1566 (footnote omitted).

---

[15] In announcing this as the standard, the Court in Bagley adopted the formulation articulated in Strickland for determining prejudice due to ineffective assistance of counsel.

Likewise, "[a] conviction will be set aside for prosecutorial misconduct where the prosecution knowingly introduces false information and there is a reasonable likelihood that the false testimony prejudiced the defendant's rights." United States v. Caporale, 806 F.2d 1487, 1518-19 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1986) (citations omitted), *see also* United States v. Alzate, 47 F.3d 1103, 1109-10 (11th Cir. 1995) (where a prosecutor knowingly used perjured false testimony or failed to correct what he subsequently learned was false, the evidence would be considered material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," which is equivalent to the "harmless beyond a reasonable doubt standard.") (citations omitted).

Defendant has not shown that at the time of the trial, the Government knew of Mason's prior conviction, that the Government suppressed the evidence, or that the verdict was not worthy of confidence in the absence of this evidence discrediting this witness. Therefore, ground seven is without merit.

Motion to amend to bring an Apprendi claim

Defendant has moved for permission to file a supplemental amendment to bring a claim based upon Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Doc. 1395 and 1394 (amended claim). In Apprendi the Court "confirm[ed] the opinion that we expressed in [Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-2363. (emphasis added).

Defendant was charged in count I with having conspired with others to possess with intent to distribute marijuana, cocaine, and crack cocaine in violation of 21

U.S.C. §§ 841 (a)(1) and (b)(1)(A)(iii). Doc. 848 (indictment), p. 2. While the amounts of the drugs were not alleged, the statutory citation put Defendant on notice that the quantities of drugs alleged were 1000 kilograms or more of marijuana, 5 kilograms or more of cocaine, or 50 grams or more of crack cocaine, and that the maximum prison sentence for any of the three was life imprisonment. United States v. Nealy, 232 F.3d 825, 830 and n. 5 (11th Cir. 2000) (noting in dicta "that the indictment likely only needs to reference the statute"), *citing*, United States v. Fern, 155 F.3d 1318, 1325 (11th Cir. 1998). As set forth in Fern, "[i]f an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge." *Id.*

The jury, however, was not asked to find the amounts of those drugs beyond a reasonable doubt. Defendant contends that as a consequence of Apprendi, his maximum sentence is 20 years, the sentence provided by 21 U.S.C. § 841 (b)(1)(C).

There may be problems with the timeliness of this new claim under the one year limitation of 28 U.S.C. § 2255. The claim does not relate back to earlier claims because Defendant did not claim in his initial motion that he as denied due process because the jury did not find drug amount beyond a reasonable doubt. *See*, Davenport v. United States, 217 F.3d 1341, 1344 (11th Cir. 2000). However, the heart of the matter is whether Apprendi has been "made retroactively applicable to cases on collateral review." The one year period for filing an initial § 2255 claim runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255, first subparagraph (3). If Apprendi is "made retroactive" by the appropriate courts, Defendant's initial one year will begin to run from that date.

With regard to whether Apprendi has been or should be applied retroactively on collateral review, the cases are in serious conflict. *Compare* United States v. Brown, No. 3:93cr262, 2000 WL 1880280 (N.D. Tex., Dec. 28, 2000) and Ware v. United States, No. 3:00-0262, 2000 WL 1827590 (M.D. Tenn., Dec. 8, 2000) *with* Darity v. United States, No. 1:95cr132, 2000 WL 1804737 (W.D. N.C., Oct. 25, 2000), *rehearing denied*, 2000 WL 1804736 (Dec. 4, 2000) and United States v. Murphy, 109 F.Supp.2d 1059 (D. Minn. 2000). The difference in result depends upon whether Apprendi concerns only a rule of criminal procedure or substantive criminal law. If Apprendi established substantive law, Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) does not govern the retroactivity analysis. Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). If it is merely a rule of criminal procedure, then Teague will dictate that Apprendi is not retroactive.

The more persuasive view is that Apprendi establishes substantive law. As our circuit recently held, drug quantity is an *element* of the conspiracy offense which *must* be charged in the indictment and proved to the jury beyond a reasonable doubt. United States v. Shepard, __ F.3d __, No. 00-10653, 2000 WL 1839206, *1 (11th Cir., Dec. 14, 2000). One cannot get more substantive than an announcement regarding the elements of offenses and what must be in indictments. To say that shifting the fact finding from the sentencing judge to jury is procedural is true in a technical sense, and was a correct application of Teague before Bousley was decided,[16] but overlooks the clarification of Teague analysis established by Bousley.

---

[16] *See* United States v. Swindall, 107 F.3d 831 (11th Cir. 1997). Swindall applied Teague to find that United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), holding that the issue of materiality in false statement prosecutions must be decided by the jury, would not apply retroactively on collateral review.

But this court need not decide these difficult questions in this case. Even if timely and even if Apprendi applies retroactively, Defendant's claim stumbles due to procedural default. Defendant did not raise this claim at trial or on direct appeal and the claim is procedurally defaulted. The court therefore looks instead to whether Defendant can demonstrate cause and prejudice to excuse his procedural default, or whether he has shown actual innocence. Bousley v. United States, 523 U.S. at 620, 118 S.Ct. at 1610-1612. The cause and prejudice test applies even though Apprendi was decided after Defendant's conviction became final. *See*, Pitts v. Cook, 923 F.2d 1568, 1571, n. 5 (11th Cir. 1991) (rejecting the argument that claim there was so novel that the failure to raise it could not constitute procedural default). Instead, legal novelty can constitute cause only if "the legal basis for the claim was not reasonably available to petititoner's counsel." *Id.*, at 1571, *citing*, Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984); Bousley, 523 U.S. at 622, 118 S.Ct. at 1611 (also citing Reed).

It cannot be said that the claim which was successful in Apprendi was not reasonably available before then, such that counsel for Defendant "lacked the tools" to construct it. 923 F.2d at 1572 (citation omitted). This is so because, as previously noted, in Apprendi the Court confirmed what it had expressed in Jones, 120 S.Ct. at 2362-2363. Jones had set forth the constitutional principle in dicta, to support the Court's interpretation of a statute that certain provisions were elements rather than sentencing factors, because otherwise "the statute would be open to constitutional doubt *in light of a series of cases over the past quarter century*, dealing with due process and the guarantee of trial by jury." 526 U.S. at 240, 119 S.Ct. at 1222 (emphasis added). The discussion of those cases in Jones reveals that the tools for *making* the claim ultimately successful in Apprendi were available well before Defendant's conviction in this case. That the claim

had been rejected in this circuit both before and after Jones[17] (as well as almost all of the others) does not constitute cause for the default. Bousley, 523 U.S. at 623, 118 S.Ct. 1611 ("futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'") (citation omitted).

Ineffective assistance of counsel may constitute cause for a procedural default, of course. But the fact that a claim is newly clarified or articulated by the Supreme Court, yet not so novel that novelty itself is cause for the default, does not mean that counsel was unreasonable for failing to raise it. Pitts, 923 F.2d at 1571-1573. "[T]here will often be a 'gap' between the spheres of novelty and ineffective assistance of counsel," *Id.* at 1573-1574 (citations omitted), and counsel's failure to raise an Apprendi claim prior to Apprendi and Jones is not ineffective assistance of counsel in the constitutional sense. This is especially true where the claim was not supported by circuit precedent. *Cf.*, Williamson v. Moore, 221 F.3d 1177, 1180 (11th Cir. 2000) (finding that a reasonable attorney would not have pursued a self defense theory for a number of reasons, one of which was that "in trial counsel's experience, self-defense arguments did not have a high rate of success in that jurisdiction.").

In summary, it was not attorney error for Defendant's trial lawyer to fail to make the Apprendi claim. Further, there was no impediment to the making of the claim. For these reasons, cause for the default has not been shown.

Thus, the only way Defendant can successfully bring an Apprendi claim now is by showing that he is actually

---

[17] *See*, United States v. Hester, 199 F.3d 1287, 1290-92 (11th Cir. 2000), *vacated and remanded in light of Apprendi*, 121 S.Ct. 336 (Oct. 16, 2000) and *overruled* (due to Apprendi) in United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000). In Hester the court noted that before Jones it had "clearly rejected the characterization of the amount of drugs as an element of the offense under § 841," and found that Jones did not require a contrary result. *Id.* (citations omitted).

innocent with respect to the sentence of 360 months. Defendant has not made such a showing. As previously discussed, he has not shown that the court's finding at sentencing based upon the trial evidence, that he was involved with more than 1.5 kilograms of crack cocaine, was wrong. Defendant was sentenced to 360 months, less than the 480 months authorized for a conspiracy to possess with intent to distribute 5 *grams* or more of cocaine base. 21 U.S.C. § 841 (b)(1)(B). Defendant has not shown that he is actually innocent of involvement in a conspiracy to possess 5 grams or more of crack cocaine.

Thus, even though the Government did not oppose the motion to amend, doc. 1415, p.2, amendment to bring an Apprendi claim would be futile. Amendment need not be allowed where it would be futile to add new claims. Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 777 n. 10 (11th Cir. 2000). Therefore, the court should exercise its discretion and deny the motion to amend. Alternatively, the court may wish to grant the motion to amend and reach the merits of the procedural default issue, which is dispositive of the claim.

For these reasons, it is **RECOMMENDED** that Defendant Marlin Davis's motions for leave to interview jurors, doc. 1383, and to amend to bring an Apprendi claim, doc. 1395, be **DENIED**, and his motion to vacate and set aside a sentence filed pursuant to 28 U.S.C. §2255, doc. 135, be **DENIED WITH PREJUDICE**.

IN CHAMBERS at Tallahassee, Florida, this 8th day of January, 2001.

/s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

Appendix H

Order Denying Defendant's Section 2255 Motion, Entered February 22, 2001

Appendix H

[Entered February 22, 2001 - Doc. 1458]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

v. 4:92cr13-WS

MARLIN DAVIS, 4:99cv522-WS

Defendant.

ORDER DENYING DEFENDANT'S SECTION 2255 MOTION

Before the court is the magistrate judge's report and recommendation (doc. 1439) docketed January 8, 2001. The magistrate judge recommends that the defendant's motion to vacate and set aside sentence be denied.

Defendant filed objections (doc. 1450) to the report and recommendation, and these objections have been included in the court's de novo review of the record. For the reasons discussed at length by the magistrate judge, this court finds that Defendant is not entitled to relief on any of the grounds raised in his motion to vacate.

Accordingly, it is ORDERED.

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order of the court.

2. Defendant's motion to vacate, set aside, or correct sentence (doc. 1325) is DENIED with prejudice.

3. The clerk is directed to enter judgment accordingly and to close Case No. 4:99cv522-WS.

4. Defendant's motions for leave to interview jurors (doc. 1383) and to amend to bring an Apprendi claim (doc. 1395) are DENIED.

DONE AND ORDERED this 21st day of February, 2001.

/s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

Appendix I

Judgment Denying Defendant's Motion To Vacate, Set Aside, or Correct Sentence, February 22, 2001

Appendix I

[Entered February 22, 2001 - Doc. 1459]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

VS CASE NO. 4:92cr4013-WS

MARLIN DAVIS,
_____/

JUDGMENT

Pursuant to and at the direction of the Court, it is ORDERED AND ADJUDGED that the Defendant's motion to vacate, set aside, or correct sentence is DENIED with prejudice.

ROBERT A. MOSSING, CLERK

February 22, 2001 /s/ Angela M. Maxwell
DATE Angela M. Maxwell
Deputy Clerk

Appendix J

Marlin Davis' Motion For Rehearing From February 22, 2001 Order And Judgment [Filed March 8, 2001 – Doc. 1462]

Appendix J

[Filed March 8, 2001 – Doc. 1462]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES
OF AMERICA

v.

CASE NO. 4:99cv522-WS
RELATED CASE NO.
4:92cr4013

MARLIN DAVIS
_____/

MARLIN DAVIS' MOTION FOR REHEARING FROM FEBRUARY 22, 2001 ORDER AND JUDGMENT

This Court by its final judgment entered on February 22, 2001, denied relief requested by Marlin Davis' Motion filed pursuant to 28 USC § 2255.

The judgment and order of this Court affirmed and approved the Magistrate's Report to which Marlin Davis filed timely objections. Marlin Davis' counsel also had requested leave for oral argument in reference to the objections to the Magistrate's Report, a matter solely within the discretion of this Court. The Government chose not to file any response to Marlin Davis' objections or any document in support of the Magistrate's findings.

Without abandoning any of the grounds that had been urged, it is respectfully suggested that special reconsideration be given to the *Edwards* related issues. Marlin Davis also

would suggest in reference to ethnicity issues, that this Court is the most appropriate forum to implement the protection of the constitutional principals. *Batson v. Kentucky*, 481 U.S. 476, 85 (1986) (We have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system.) This is particularly true because this Court, as pointed out in the Objections to the Magistrate's Report, had demonstrated its full willingness to provide a fair trial free of ethnicity issues if Court appointed trial counsel had objected. It should also be noted that Government counsel had an equally affirmative duty to avoid ethnicity. The verdict resulted from the "Jamaican" versus "American" strategy as set forth in the record excerpts filed with this Court.

The *Edwards* line of cases provides a prompt and dispositive resolution of the 2255 Motion that is fully in accord with *Apprendi*. Rehearing is especially warranted because the Magistrate's Report (Doc. 1439) erred in finding use of marijuana was not introduced in the Government's case by testimony elicited by the Government from the Government's witnesses.

> The testimony on these pages has been carefully examined and it only concerns personal possession or use of marijuana by the witnesses, evidence which was elicited not by the Government, but on cross examination by attorneys for Defendants to discredit the witnesses. The one exception is testimony of Gregory Matthews, where he admitted to "selling" and smoking marijuana, abut again this was elicited by Defendants in an attempt to discredit Matthews. Doc. 1120, p. 16. It was not evidence presented by the Government. 1439 at 8.

The Report is not correct. In addition to this error, the Report failed to recognize that government witnesses frequently testified in support of the government conspiracy case using "drugs" and "dope." As the Government brought

out in direct examination, government witnesses used the term "drugs" to include marijuana. The Magistrate and apparently this Court on review of the Magistrate's Report did not consider the direct marijuana testimony the impact that Government testimony referring to "drugs" included marijuana.

This can be demonstrated by just a small portion of the trial transcript.

A: They sold **drugs**.

Q: What type of **drugs**?

A: Crack cocaine.

Q: All right. Specifically referring to **Bounty**, did he sell anything other than crack cocaine?

A: **Marijuana**.

Q: Did Bounty work a regular job?

A: No, sir, not to my knowledge, not in Marianna.

Q: How was it that you met Emerson Davis?

A: He came over with Bounty, and Bounty introduced me to him.

Q: Did you and he become attracted to one another?

A: Yes.

Washington – Direct, R8-1120-122.

Q: Now, you never told the police that you hid the **marijuana** on the night of the arrest, did you?

A: No, I didn't.

Q: Who knew that you hid the **marijuana** on the night of the arrest?

A: I might have told Emerson or Mark.

Ford – Redirect, R5-1105-151-52.

Q: And he asked you whether or not Mercy had any **dope**.

A: No.

Q: Was there anybody else in the apartment with you?

A: Garfield.

Q: Did Garfield have any **dope** on him?

A: We was in the room, and Mercy asked Garfield, "Do you have any **dope**?"

Garfield said no, but then we are going to the room and Mercy said he find Garfield with a pack of **weed**, so he took it from him. And so when we started questioning him, he said, "Don't let people in here find us with dope. So whatever you have on your person or don't use, just get rid of it." So he went in the back and he –

Q: Flushed it?

A: Yes.

Matthews – Redirect, R8-1120-92.

* * *

Q: Okay did any of the other people of Jamaican decent who were up in the Garden you already testified about who were selling **drugs** up there, did any of them ever bring money into your house as well?

A: Yes, if I'm not mistaken I think Jubee and Bounty.

R9-1108-6.

* * *

Q: Was there any **drugs** dealing in the Marianna Gardens Apartments before the Jamaican came?

A: No sir, not that I know of.

Bailey – Redirect, R9-1108-194

* * *

Q: Now were there any other Jamaicans up in the Marianna Gardens Apartments who were working with Mercy?

A: Well, not really, **Bounty** and all them was up there Bounty, Jubee, Garfield was working for them too.

Borders – Direct, R9-1108-201

* * *

Prosecutor:

Q: All right. When you were living in the Marianna Garden Apartments, did there ever come a time when people of Jamaican descent started coming to the Marianna Garden Apartment?

A: Yes.

Q: And who were the first ones that – that you knew to be of Jamaican descent that came to the Marianna Garden Apartments?

A: Mercy.

Bailey – Direct, R9-1108-113.

* * *

Prosecutor:

Q: Was there **drugs** dealing in the Marianna Garden Apartment before the Jamaican came?

A: No sir, not that I know of.

Bailey – Redirect, R9-1108-194.

* * *

The crux of the Government's conspiracy case was a simple abc: (a) Jamaicans, (b) drugs, (c) Marianna Garden Apartments. The drugs included marijuana. Under the very language of the report, this Court should vacate and remand

for further proceedings or enter an order resentencing Marlin Davis based on marijuana:

> In short, while a different case might be presented had the government presented any evidence of a conspiracy to possess with intent to distribute marijuana, here the Government put on *no* evidence marijuana was an object of the conspiracy. Thus, there is no ambiguity about the jury verdict with respect to whether the jury could have found that Defendant conspired to possess with intent to distribute marijuana. Stated another way, had Defendant been charged only with a conspiracy to possess with intent to distribute marijuana, he would have been entitled to a judgment of acquittal. The jury, therefore, must have convicted him only of involvement with cocaine and crack cocaine. Doc. 1439 at 9-10.

Under *Edwards* the sentence for marijuana would be time served. Under the Magistrate's test, we would also suggest a judgment of acquittal would have been proper for cocaine and crack cocaine.

In the *United States v. Pace*, 981 F.2d 1123, 1129 (10th Cir. 1992), the Tenth Circuit recognized that "dope" or "drugs" creates a reference to multiple substances that could be involved in the conspiracy:

> The transcript, however, also includes approximately thirty references to "dope" or "drugs," which might refer to either drug. There were a few references to both drugs, including that certain chemicals are "precursors that are used to manufacture amphetamine and methamphetamine..."

In this case the indictment, the testimony, the jury instructions, the verdict, the Pre-Sentence Report, and the judgment all included marijuana.

***

[OMITTED]

***

CONCLUSION

Rehearing should be granted. The Magistrate's Report should be vacated for appropriate modification.

Respectfully submitted this 8th day of March, 2001.

/s/ William VanDercreek
WILLIAM VANDERCREEK
Texas Bar No. 20442000
9441 LBJ Freeway, Suite 350
Dallas, Texas 75243
(214) 361-4005 Tel/Fax
(850) 561-9147 Tel/Fax

/s/ W. Scott Newbern
W. SCOTT NEWBERN
Florida Bar No. 0098108
Post Office Box 1328
Tallahassee, Florida 32303
(850) 591-7800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Terry Flynn, Assistant United States Attorney, 111 North Adams Street, 4th Floor, Tallahassee, Florida 32301 this 8th day of March, 2001.

/s/ William VanDercreek
ATTORNEY

(3)

Supreme Court, U.S.
FILED
JUL 15 2003
OFFICE OF THE CLERK

No. 02-1796

In The

Supreme Court of the United States

MARLIN DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For Eleventh Circuit

PETITIONER MARLIN DAVIS SUPPLEMENTAL BRIEF

W. Scott Newbern
215 South Monroe Street
Suite 303
Tallahassee, Florida 32302
850.591.1707

William VanDercreek
Counsel of Record
9441 LBJ Freeway Suite 350
Dallas, TX 75243
214.361.4005

Attorneys for Petitioner

9pp

QUESTIONS PRESENTED

PREFACE Petitioner sought a Certificate of Appealability ("COA") from denial of relief under 28 U.S.C. § 2255. On January 8, 2003 the United States Court of Appeals for the Eleventh Circuit denied a Certificate. Davis filed a motion for reconsideration, which was denied on February 24, 2003.

On February 25th, this Court decided *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003) which expressly clarified the criteria for COA's. The issues identified in the request for the COA were directly supported by rulings of this Court and several federal appellate courts. Davis promptly filed his Motion for Leave to file a Request for Further Review. The Motion and the Request were returned by the Clerk on the basis that a second Motion for reconsideration was not authorized.

Petitioner Presents Alternative Questions:

Whether this Court should grant certiorari and remand for reconsideration in light of this Court's subsequent decision in Miller-El v. Cockrell.

OR

Whether a COA should have been granted to consider the following issues:

1. *Whether the sentence for conviction under a single-count indictment charging a conspiracy "to distribute controlled substances, that is cocaine, cocaine base (commonly known as crack cocaine) and marijuana" should be based on the controlled substance with the least penalty instead of the substance with the greatest penalty*

2. *Whether ineffective assistance of counsel, by failure to object to the government's pervasive use of Petitioner's*

ethnicity to prove membership in a drug conspiracy, and to prejudice the jury by blaming "Jamaicans" (blacks of Jamaican national origin form the Miami area) of using and exploiting "Americans" (local North Florida blacks as were five of the jurors), violated Petitioner's constitutional rights.

3. *Whether ineffective assistance of counsel, by failure (a) to seek a change of venue, (b) to use the opportunity afforded by the* district court *to conduct a meaningful voir dire of jurors for exposure to newspaper and television reports with extensive reference to Jamaicans and falsely accusing petitioner's brother and sole co-defendant at trial of being a "Drug King" responsible for the well publicized death of a state trooper, and (c) failure to prevent consequence of pretrial publicity from infecting the jury trial proceedings, denied Petitioner's constitutional right to fair trial.*

PARTIES

Marlin Davis

Emerson Davis: Marlin Davis' brother and sole co-defendant at trial has a COA pending in the Eleventh Circuit from the same opinion of the district court denying relief to Marlin Davis. [Reconsideration of the COA was denied on June 24, 2003. A Petition for Certiorari will be filed.]

(Both are presently incarcerated)

I. Supplemental Brief Filed Pursuant to Supreme Court Rule 15

The Petition for Certiorari was filed on May 23, 2003 and docketed on June 11. On June 17, 2003, the Department of Justice promulgated the "Fact Sheet on Racial Profiling." This document supports the issues presented and arguments in the Petition concerning the improper use of ethnicity.

The Solicitor General on June 18, 2003, waived a response to the Petition "unless requested to do so by the court." In light of the proclaimed policy of the Justice Department, it is suggested that it would be appropriate for the Court to request a response concerning the use of ethnicity (as well as the conflict existing on the proper sentence in multi-object conspiracies).

II. Under Principles proclaimed by the President and the Justice Department, this Court in keeping with its own pronouncements, should direct the Eleventh Circuit to issue the Certificate of Appealability.

Petitioner has urged under principals promulgated by this Court in *Batson v. Kentucky,* 476 U.S. 79 (1986) and numerous other cases, that federal courts have a duty to eradicate the use of racism in the administration of justice. This policy has been recognized, broadened and strengthened by the substance and illustrations of the June 17th proclamation that are applicable to *Davis.* As stated in Marlin Davis' Petition, the Government made pervasive use of Jamaican ethnicity (1) to prove membership in a drug conspiracy and not for the purpose of physical identification of unknown persons and (2) to prejudice the jury by blaming Jamaicans (blacks from Miami area of Jamaican national origin) using and exploiting Americans (local North Florida

blacks, as were five of the jurors). The trial excerpts regarding the use of ethnicity contain twenty-three pages. The Petition sets out a few examples at pages 19 through 22. These trial excerpts would be excellent illustrations of what the Justice Department now explicitly condemns in the June 17th document:

> **Stereotyping Certain Races as Having a Greater Propensity to Commit Crimes is Absolutely Prohibited.**

The use of ethnictiy and national origin in the Davis case does not come within the carefully tailored exceptions to the prohibition proclaimed by the Justice Department:

> **Acting on Specific Suspect Identification Does Not Constitute Impermissible Stereotyping.** The situation is different when a federal officer acts on the personal identifying characteristics of potential suspects, including age, sex, ethnicity or race. Common sense dictates that when a victim or witness describes the assailant as being of a particular race, authorities may properly limit their search for suspects to persons of that race. In such circumstances, the federal officer is not acting based on a generalized assumption about persons of different races; rather, the officer is helping locate a specific individual previously identified as involved in crime.
>
> *Example*: While parked by the side of the highway, a federal officer receives an "All Points Bulletin" to be on the look-out for a fleeing bank robbery suspect, a man of a particular race and particular hair color in

> his 30s driving a blue automobile. The officer may use this description, including the race of the particular suspect, in deciding which speeding motorists to pull over.
>
> * * *
>
> *Example*: The victim of an assault at a local university describes her assailant as a young male of a particular race with a cut on his right hand. The investigation focuses on whether any students at the university fit the victim's description. Here investigators are properly relying on a description given by the victim, part of which included the assailant's race. Although the ensuing investigation affects students of a particular race, that investigation is not undertaken with a discriminatory purpose. Thus use of race as a factor in the investigation, in this instance, in permissible.

In full accord with the statements and illustrations of federal policy quoted above, the Petition for Certiorari at page 20 stated,

> There is a constitutional difference between using color or race to physically identify an individual otherwise unknown and using color or race to identify the members of a conspiracy. Here Jamaican was the litmus test for proving membership in the charged drug conspiracy. The physical identity argument borders on being outright specious. There was not an identity issue of unknown persons – all of the witnesses who identified and testified against Marlin Davis or Emerson Davis personally knew who they were.

> *This was not a rape victim describing an unknown attacker or a wanted bulletin physically describing a fugitive for identification by strangers* (emphasis added).

The Government's use of ethnicity was not to identify unknown persons but instead for the purpose of developing the Government's prejudicial theme of "Jamaicans" versus "Americans" before a jury with five "Americans." Racial ethnicity and national origin were presented at every opportunity. For example, the Government introduced into evidence pictures of known black persons who then were further disclosed to be Jamaican [Blacks] or American [also Blacks].

> Q: And, who is in the photograph? [Exhibit 12]
> A: Me, Mercy, Marlin and Jubee. The other two I don't know.
>
> * * *

After the witness identified the picture of the Defendant Marlin Davis and his co-defendant Emerson [Mercy] Davis, whose Jamaican heritage was well known to the jury, the witness was asked:

> Q: Now is Jubee an American or is Jubee a Jamaican?
> A: As far as I know, he's Jamaican.

When the pervasive comments on national origin are coupled with pretrial publicity and government witnesses' testimony of Jamaicans using the Americans to sell drugs and testimony stating all the Jamaicans had been indicted, the unconstitutional use of ethnicity would seem incontrovertible.

In the Davis trial, there were no drugs in evidence. The alleged involvement in a very loosely defined conspiracy to sell and distribute drugs in North Florida, Alabama and Georgia was based upon self-serving testimony of persons seeking a reduction in sentence. The weakness in proof and credibility of the testimony to show membership in the conspiracy was supplied by ethnicity. Without the use of ethnicity in the context of pretrial publicity, Marlin Davis would not have been convicted.

To accomplish the purpose manifested by the long-standing pronouncements of this Court and the recent proclamation by the Justice Department, questions raising the misuse of ethnicity are not to be shunned or avoided by denial of COAs. Here, the government on direct appeal avoided the issue by blaming the court appointed trial counsel for failure to object. This necessitated the request for relief for ineffective assistance of counsel under §2255 [At trial, the government had adroitly negated the defense counsel's Motion in Limine prohibiting "Jamaican posse" by skipping the word "posse" and peppering the record with "Jamaican"]. The bright light of judicial review needs to illuminate and redress the improper use of ethnicity. The public policy of the United States should not be an empty gesture of principles.

Respectfully submitted,

W. Scott Newbern
215 South Monroe Street
Suite 303
Tallahassee, FL 32302
850.591.1707

William VanDercreek
Counsel of Record
9441 LBJ Freeway
Suite 350
Dallas, TX 75243
214.361.4005

(4)

Supreme Court, U.S.
FILED
SEP 17 2003
OFFICE OF THE CLERK

No. 02-1796

In The

Supreme Court of the United States

MARLIN DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER MARLIN DAVIS' SECOND SUPPLEMENTAL BRIEF

W. SCOTT NEWBERN
215 South Monroe Street,
Suite 303
Tallahassee, Florida 32302
850.591.1707

WILLIAM VANDERCREEK
Counsel of Record
9441 LBJ Freeway, Suite 350
Dallas, Texas 75243
214.361.4005

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

QUESTIONS PRESENTED

Whether this Court should grant certiorari and remand for reconsideration in light of this Court's subsequent decision in Miller-El v. Cockrell.

OR

Whether a COA [Certificate of Appealability] should have been granted to consider the following issues:

1. Whether the sentence for conviction under a single-count indictment charging a conspiracy "to distribute controlled substances, that is cocaine, cocaine base (commonly known as crack cocaine) and marijuana" should be based on the controlled substance with the least penalty instead of the substance with the greatest penalty.

2. Whether ineffective assistance of counsel, by failure to object to the government's pervasive use of Petitioner's ethnicity to prove membership in a drug conspiracy, and to prejudice the jury by blaming "Jamaicans" (blacks of Jamaican national origin from the Miami area) of using and exploiting "Americans" (local North Florida blacks as were five of the jurors), violated Petitioner's constitutional rights.

3. Whether ineffective assistance of counsel, by failure (a) to seek a change of venue, (b) to use the opportunity afforded by the district court to conduct a meaningful voir dire of jurors for exposure to newspaper and television reports with extensive reference to Jamaicans and falsely accusing petitioner's brother and sole co-defendant at trial of being a "Drug King" responsible for the well publicized death of a state trooper, and (c) failure to prevent consequence of pretrial publicity from infecting the jury trial proceedings, denied Petitioner's constitutional right to fair trial.

PARTIES

Marlin Davis

Emerson Davis: Marlin Davis' brother and sole co-defendant at trial will file by mail on September 18, 2003 a Petition for Writ of Certiorari raising substantially the same issues.

Both are presently incarcerated.

I. Second Supplemental Brief Filed Pursuant To Supreme Court Rule 15

The Petition for Certiorari was filed on May 23, 2003 and docketed on June 11th. On May 27, 2003, this Court decided *Bunkley v. Florida*, 123 S. Ct. 2020 (2003). The first Supplemental Brief concerned the Department of Justice's June 17, 2003 proclamation on ethnicity relating to the Second and Third Questions Presented.

The May 27th *Bunkley* decision concerns the petitioner's argument under the Sixth Amendment on page 16 of the Petition relating to the First Question Presented, and whether this Court should, or needs to, make *Apprendi v. New Jersey,* 530 U.S. 466 (2000) retroactive.

II. Whether *Apprendi* Needs, or Should be, Retroactively Applied Under Principles Recognized in *Bunkley* to Petitioner's Sixth Amendment Argument

The district court rejected Marlin Davis's argument that the sentence based upon a general verdict for a drug conspiracy conviction involving multiple objects should be based on the substance with the least penalty. Instead, Mr. Davis was sentenced for the substance with the greatest penalty. The jury had not been instructed it must find guilt beyond a reasonable doubt for all three controlled substances in order to convict for a conspiracy to distribute controlled substances. The district court, in denying §2255 relief, determined Marlin Davis to be guilty beyond a reasonable doubt for all three controlled substances, and not a combination or one or more.

The Petition for Writ of Certiorari at page 16 stated:

> Marlin Davis was found guilty of a "drug conspiracy" involving "a controlled substance." The individual jurors all could have found "a drug conspiracy" with each juror finding a different controlled substance or a different combination of controlled substances. For the district court to hold that the Davis jury could not have done so violates due process under the Sixth Amendment. U.S. CONST., Amendment VI.

The violation of the Sixth Amendment would seem apparent under basic principals of constitutional law, including those underlying the rationale of *Apprendi,* whether or not *Apprendi* is applied retroactively by this Court. The district court ruling recognized that if this Court should make *Apprendi* retroactive it would be dispositive:

> In his motions for rehearing and resentencing, Davis argues that his sentence is invalid under *Apprendi v. New Jersey*, 530 U.S. at 466, a case decided after Davis's conviction and sentence were affirmed on appeal. Although he has not abandoned or withdrawn his argument that *Apprendi* should be made retroactive to his case, Davis now concedes that, because the Supreme Court has *not* made *Apprendi* retroactive, he is not entitled to relief under *Apprendi*. Doc. 1561 at 2. *See United States v. McCoy*, 266 F.3d 1245 (11th Cir. 2001) (holding that *Apprendi* does not apply retroactively to cases on collateral review and *Apprendi*-error does not constitute a jurisdictional defect), *cert. denied*, 122 S. Ct. 2362, 153 L. Ed. 2d 183 (2002).

Marlin Davis preserved the *Apprendi* issue in the motion for a COA before the district court and the court of appeals.[1]

In *Bunkley* this Court recognized that the application of retroactivity in a request for post conviction relief under state law may be constitutionally required. "[I]t has long been established by this Court that the Due Process Clause . . . forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." (123 S. Ct. at 2023, *citing Fiori v. White*, 531 U.S. 225.) Whether the *Apprendi* ruling constitutes a change in law that should be applied retroactively has not been determined by this Court.

This Court in *Bunkley*, as in *Fiori*, found it unnecessary to rule whether a constitutional retroactivity analysis was necessary.[2] Applying the rationale of *Bunkley* to the present proceeding, it would seem – if the principles underlying the Sixth Amendment were violated by the district court's finding on guilt in reference to the specific

---

[1] *United States v. Marlin Davis*, Motion for Certificate of Appealability to the Eleventh Circuit, No. 02-15948-F, p.3: "(5) Whether the application of *Apprendi* should be made retroactive by the Supreme Court of the United States (requested to preserve the issue in event of future action by the Supreme Court)."

[2] The Florida Supreme Court in post conviction relief had refused to give retroactive effect of its 1997 ruling that a pocketknife with a 3 ¾ inch blade was not a prohibited weapon to a 1989 conviction concerning a 2½ to 3 inch blade. This Court remanded for determination whether Bunkley's pocketknife was within the exception at the time of his conviction. If so, there was no crime and no need for retroactive analysis.

objects of the conspiracy, then *Apprendi* retroactivity would not have to be proclaimed by this Court.

As noted, Marlin Davis concedes this Court has not made *Apprendi* retroactive, but the absence of this declaration should not allow the district court to violate the right to a jury trial by making post conviction finding of disputed facts. Rather than submitting interrogatories to the jury at trial, the court in essence served itself and answered special interrogatories for the purpose of denying relief under §2255. If the district court is correct that it can make such determinations in absence of this Court making *Apprendi* retroactive, this Court as a matter of Due Process should make *Apprendi* expressly retroactive for application under §2255.

At trial, Marlin Davis had been sentenced on the basis of crack cocaine without a jury determination of the amount of the substance. The magistrate and district judge initially denied Davis' §2255 request to be sentenced for the substance with the least penalty (marijuana) on the mistaken premise that government had not introduced evidence of marijuana to prove its case. Marlin Davis' objections to the magistrate's report and to the district court's initial ruling both included quoted record references of the government's marijuana testimony. (*See* Supplemental Appendix "J"). On rehearing (the September 24, 2001 denial of rehearing for §2255 relief), the district court then found the verdict to be unambiguous and that all three objects had been found by the jury, including marijuana. The district court's instructions did not require an individual finding of cocaine, cocaine base, and marijuana. The charged conspiracy under the instruction was to "distribute controlled substances." The jury was expressly instructed: "Section 841 makes it a crime for

anyone to knowingly distribute or possess to distribute a controlled substance."[3] The general jury verdict was a response to that charge.

The district court claimed this post conviction right to make findings of guilt beyond a reasonable doubt for each and every object of the conspiracy because *Apprendi* had not been made retroactive by this Court. For retroactive application to §2255 proceedings, *Apprendi* must be made retroactive by this Court, which it has not done to date. *Harris v. United States*, 536 U.S. 545, 581 (2002) ("No Court of Appeals, let alone this Court has held that *Apprendi* has retroactive effect." Thomas, J., dissenting).

If Due Process could require a state court in state court post conviction proceedings to give retroactive effect to a state court decision of constitutional dimensions, then the same Due Process clause could require this Court to make *Apprendi* retroactive. This is a question of great public interest and significance and should be considered by this Court upon granting the Petition for Writ of Certiorari.

Respectfully submitted,

W. SCOTT NEWBERN
215 South Monroe Street
Suite 303
Tallahassee, FL 32302
850.591.1707

WILLIAM VANDERCREEK
Counsel of Record
9441 LBJ Freeway
Suite 350
Dallas, TX 75243
214.361.4005

[3] *See* Petition for Certiorari at p. 14. The written jury instructions that were furnished to the jury were set out in document No. 976 in the original criminal proceeding.